

OPINIONS/
OF THE
Corporation Counsel and
Assistants

FROM
APRIL 1, 1911, TO DECEMBER 31, 1912.

PUBLISHED BY AUTHORITY OF THE
CITY COUNCIL
OF THE CITY OF CHICAGO

Compiled and Edited by
WILLIAM H. SEXTON
Corporation Counsel



PREFACE.

The first volume of "Opinions of the Corporation Counsel and Assistants" published in book form in the year 1897 under the supervision of William G. Beale, Esq., then corporation counsel, contains the opinions rendered under his administration and also those opinions then preserved in the records of the office of the corporation counsel from the time of the Chicago fire.

The second volume of opinions was compiled by Edgar Bronson Tolman, Esq., corporation counsel, and contained carefully selected opinions of the law department from April 5, 1897, to April 10, 1905, thereby also including the opinions rendered during the four years incumbency of Charles M. Walker, Esq.

The third and fourth volumes of opinions were compiled by Edward J. Brundage, Esq., corporation counsel, and covered the period from April 15, 1907, to April 1, 1911.

It is unfortunate that the opinions rendered during the incumbency of Hon. James Hamilton Lewis, corporation counsel, from July 10, 1905, to April 15, 1907, were not published in book form. I sincerely trust that his opinions will be published in the near future.

The opinions contained in this volume were selected by Mr. John W. Beckwith, First Assistant Corporation Counsel, and Mr. Leon Hornstein, Assistant Corporation Counsel.

The publication of this volume has been supervised by Mr. Loring R. Hoover, Assistant Corporation Counsel. To this duty he brought the same intelligence and great industry which has characterized all his work in the law department.

I hope this compilation of opinions will be as useful as those prepared by my distinguished predecessors.

Chicago, October 5, 1914.

WM. H. SEXTON,
Corporation Counsel.

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FROM

APRIL 1, 1911, TO DECEMBER 31, 1912.

APRIL 3, 1911.

HON. WILLIAM J. PRINGLE, Chairman, Committee on Gas, Oil
and Electric Light.

Dear Sir:

We have your letter asking for an opinion upon the present legislative power of the city to regulate public service corporations, and submitting certain question which we will answer in the order in which you put them.

Your first question is: "What is the present legislative power of the City of Chicago as to regulation or control of the following public service corporations: transportation, gas, telephone, electricity, water and harbors?"

An Act approved May 18, 1905 (Hurd's Rev. Stat. page 498) specifically authorizes the City of Chicago "to prescribe by ordinance maximum rates and charges for the supply of gas and electricity for power, heating and lighting furnished by any individual, company or corporation, to such city and the inhabitants thereof. Such rates and charges to be just and reasonable and may be fixed for a period not exceeding five years, and in case the corporate authorities of any such city shall fix unjust and unreasonable rates and charges the same may be reviewed and determined by the Circuit Court of the county in which said city is situated."

This Act was submitted to and adopted by this city at an election held November 7th, 1905.

The City and Village Act, under which the city is incorporated, gives the city council power to regulate the use of the streets; regulate the openings therein for the laying of gas, or water mains and pipes; to regulate traffic upon the streets; to regulate the speed of vehicles, cars and locomotives within the city limits; to permit, regulate or prohibit the construction of a street railway in any street; to provide for and change the location, grade and crossing of any railroad; to deepen, widen and dock any water course; to construct and keep in repair canals and slips for the accomodation of commerce; to regulate and control the use of public and private landing places, wharves, docks and levees; to control and regulate the anchorage, moorage and landing of all water craft; to license, regulate and prohibit wharf boats, tugs and other boats used about the harbor; to fix the rate of wharfage and dockage; to collect wharfage and dockage from all boats landing at or using any public landing place, wharf, dock or levee; to make regulations in regard to the use of harbors, towing of vessels, opening and passing of bridges; to pass any police ordinance.

An Act approved June 6th, 1891 empowers the city to prescribe by ordinance maximum rates and charges for the supply of water furnished by any individual, company or corporation to the city and its inhabitants.

Under the authority just mentioned the city can regulate street car fares, compel street car companies to issue transfers, fix the charges for gas, electricity and water and for the use of public docks, wharves and landings.

The city can authorize telephone companies to construct and maintain posts, wires and conduits in the streets, but unless it specifically reserves the right, it cannot at a later date fix the rates to be charged by the telephone company for service rendered.

Your second question is "What is the present power of the city council, if any, to organize or create a small commission or bureau of experts for the purpose of assisting the city council in its exercise of present power of regulation or control of the above named public service corporations, or any of them?"

It is within the power of the city council to organize a commission or bureau for the purpose of assisting the council in its exercise of its power of regulating or controlling public service corporations, but the city cannot give such commission or bureau power to act in its place.

The third question is: "To what extent may the city council delegate its authority over the above named public service corporations?"

The public powers devolved by law upon the council to be exercised by it when and in such manner as it shall judge best cannot be delegated to others.

Our Supreme Court has held that while the city council cannot divest itself of its proper functions to determine what the law shall be, it may authorize its officers to determine facts and do those things which the council might properly, but cannot understandingly or advantageously do. It is presumed that such officials, so authorized, will perform their duty with reasonable intelligence and in accordance with the generally accepted meaning of the words. If there should be an abuse of power on their part, the courts will restrain the official and protect those concerned. (*Block v. Chicago*, 239 Ill. 251.)

The fourth question is: "If such commission or bureau was created, what authority, if any, would the council have to delegate the work of handling complaints made against the public service corporations mentioned above; also complaints made against public service corporations mentioned above as to the violation of rules as to service, etc.?"

The council cannot delegate to any such commission or bureau anything but the duty of ascertaining and reporting of facts and exercising discretion in minute matters that the council itself cannot advantageously handle. It cannot give to any such commission or bureau power to enforce the law or impose penalties.

Very truly yours,

WILLIAM D. BARGE,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

APRIL 10, 1911.

HON. MURDOCH CAMPBELL, Commissioner of Buildings.

Dear Sir:

Your letter of recent date to Edward J. Brundage, Corporation Counsel, asking for an opinion in regard to the city's right to collect annual inspection fees from theaters and public dance, lodge and assembly halls, for which an annual license fee is charged by the city, and also whether the city should charge for the annual inspection of churches which are exempt from taxation by the state law, has been referred to me for answer, and in reply I beg leave to state that this annual inspection fee required by Section 237 of the building ordinances passed by the City Council December 5, 1910, is not, in my opinion, a tax but is a charge made for inspection services rendered by the city for the benefit of the person, firm or corporation owning the building, or buildings, in question, "imposed under the principle that they are compensation for services rendered in and about making such inspection, which is presumably beneficial to the person upon whom the fees are imposed under and by virtue of the general police powers,"

C., W. & V. Coal Co. v. The People, 181 Ill., p. 275;

City of Charleston v. Rogers, 2 McCord 495;

Cooley on Taxation, 413;

and that you should charge the inspection fees provided for in said section, even though certain buildings, such as theaters and dance, lodge and assembly halls, pay license fees to the city.

Churches are specifically included in the class of buildings for which an annual inspection is required. I quote from Paragraph (a) of said Section 237 as follows:

"The commissioner of buildings and his assistants shall make an annual inspection of all theaters and places of amusement, worship, instruction or entertainment, and also all other buildings over two stories in height, except residences, and except tenements three stories or less in height * * *."

Section 2, Chapter 120, of the State Law exempts from taxation "all church property actually and exclusively used

for public worship, and all parsonages or residences actually and exclusively used by persons devoting their entire time to church work, when the said buildings and the land on which said buildings are located (said land to be of reasonable size for the location of said buildings) are owned by the congregation or church authorized and not used for pecuniary profit." But in my opinion the charge provided for by Paragraph (h) of said Section 237 of the building ordinances of December 5th, 1910, is an inspection fee and our Supreme Court has held in the case of *C., W. & V. Coal Co. v. The People*, 181 Ill. 275, that inspection fees are not taxes.

Since the fees for annual inspection of places of worship, such as churches, are not taxes, then in my opinion the exemption of churches from taxes contained in the State Law above quoted does not exempt them from the payment of inspection fees.

Respectfully submitted,

WM. S. STAHL,
Assistant Corporation Counsel.

Approved:

(Signed.) EDWARD J. BRUNDAGE,
Corporation Counsel.

APRIL 13, 1911.

WILLIAM CARROLL, Esq., City Electrician.

Dear Sir:

Your letter of the 10th instant. addressed to the Corporation Counsel in which you inquire whether the Board of Election Commissioners is a department of the city government and whether the officers and employes of said Board will be entitled to free telephone service after its removal to the new quarters in the City Hall has been referred to me, and in reply I beg leave to say:

The Chicago Telephone Company's ordinance of November 6, 1907, in Section 4 thereof, provides as follows:

"The Company shall furnish the City, without charge, throughout the present or any future City Hall, or any building or buildings or parts thereof used temporarily as a substitute for said City Hall upon written request of the Commissioner of Public Works telephone

facilities and telephone exchange service of any kind or class furnished by the Company to any of its subscribers at the time of the making of such request, *for the use of officers and employes of the city, * * *.*"

The Board of Election Commissioners of the City of Chicago has jurisdiction by statute over elections within the City of Chicago only and the statute provides that all of the expenses incurred by it shall be paid by the city. (Section 281, Chap. 46, Hurd's Rev. Stat. of 1908.) The city has appropriated for the expenses of the Board of Election Commissioners more than \$235,000.00 for the current year, this being exclusive of the appropriation for rental of polling places and the services of judges and clerks of election.

I am of the opinion, therefore, that the Board of Election Commissioners is a department of the city government and that the officers and employes of said Board are "officers and employes" of the city within the provision of the ordinance above quoted, and that the city will be entitled to free telephone service for the use of such officers and employes in the new quarters of said Board in the City Hall.

The fact that the Board of Election Commissioners have been and are now paying the full rate without the twenty-five per cent. discount which the other city departments are receiving does not, in my opinion, alter its status or relation to the city, and, therefore, does not prevent the city from receiving free telephone service as above stated.

Yours very truly,

CLARENCE N. BOORD,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

APRIL 22, 1911.

HON. JOHN E. TRAEGER, City Comptroller.

Dear Sir:

Your communication of April 18th requesting the Corporation Counsel to interpret certain clauses contained in leases of the Assessors and the Journal Buildings with refer-

ence to final ownership of additions and improvements made in temporary quarters occupied by the city during the construction of the new city hall, is referred to me for reply.

The lease from Maurice Rosenfeld, *et al.* of the first, second, third and fourth floors in the Assessors building contains this language:

“*All additions, fixtures or improvements which may be made by lessee to said premises, except movable office furniture, shall be the property of lessors.*”

The articles installed by the city in this building consist chiefly of wooden counters, light partitions of wood and glass about eight feet high, and netted wire cages in the Treasurer's and Collector's office. In most cases these are attached to the floor or walls by means of cleats and screws, but in the Collector's office, where the floor is of concrete, the counters, cages, etc. are practically unattached.

It is a general rule that, as the interest of the tenant in a building is temporary only, those articles which he annexes for himself with a view to his own enjoyment during his term, and not to enhance the value of the building and which can be detached without material injury to the building may be considered as “trade fixtures” and removed at the expiration of the lease.

Baker v. McClurg, 198 Ill. 28.

Ward v. Earl, 96 Ill. App. 635.

In the present case, however, the clause regulating the removal of “fixtures or improvements, except movable office furniture” raises the question whether it was intended to restrict the common law rule as to trade fixtures. In an early New York case (*French v. Mayer*, 29 Barb. 363) the word “improvements” was said to be more comprehensive than “fixtures” and to embrace every addition, erection or annexation made by the lessees to render the premises more valuable and convenient to them.

This case has not, however, been very generally followed, and after an examination of numerous authorities we think that a lease providing that additions, improvements and fixtures shall become the property of the lessor at the end of the term may fairly include only such improvements to the

building as tend to enhance its permanent value and be of use to future tenants, irrespective of the nature of their business. Heating apparatus, display windows in a store and stalls erected in a stable are examples. Such a restriction does not, apparently, apply to hotel, restaurant or saloon fixtures, or to other articles of this kind which are adapted only to the particular business of the person who installs them, and it appears to be the policy of the courts to construe such clauses somewhat liberally in favor of removal by the tenant.

See

Smusch v. Kohn, 49 N. Y. Supp. 176.

Ames v. Trenton Brg. Co., 56 N. Y. Eq. 309.

Cubbins v. Ayres, 72 Tenn. 329.

Liebe v. Nicolai, 30 Ore. 364.

Hey v. Bruner, 61 Pa. St. 87.

Tiffany's Landlord and Tenant, pp. 1606-1611.

The counters, low partitions, cages, etc. installed and used by the city in its temporary office should not, in our opinion, be treated as permanent additions or improvements to the building, but rather in the nature of trade fixtures intended and adapted only for the use of the tenant who installed them. In contemplation of law we think that they are, in the language of this lease, "movable office furniture" wherever they can be removed without material damage to the building. We therefore recommend that you cause to be removed from this building such articles as were placed there by the city and are not permanent improvements, as outlined above.

The lease of the temporary quarters in the Journal building provides that "all alterations and additions to said premises shall remain for the benefit of the lessor." This language is not so comprehensive as that in the lease of the Assessors building, and so far as we are aware the city has made no alterations or additions in this building of a permanent character. The low partitions installed should be treated on the same basis as those in the Assessors building and we believe that the desks in the civil service examination room and also the cement testing apparatus can, although annexed to the building, be removed without material injury.

The above articles may be removed from these buildings only during the term of the city's lease, and we therefore recommend that you take such action as may be desired before May 1st.

Dreiske v. People's Lumber Co., 107 Ill. App. 285 and cases cited.

There is also a rule to the effect that by the acceptance from the landlord of a new lease containing no mention of fixtures annexed during the tenancy under the former lease, the tenant loses his right to remove such fixtures, the theory being that the fixtures are a part of the land and that the tenant, by an acceptance of the new lease, takes such an interest in the fixtures only as he does in the land, which is merely a temporary interest. The fact that the written lease and acceptance thereof for the Assessors building expired December 31, 1910, does not, however, destroy the right of removal in this case, since it is also held that a tenant holding over *by permission*, as is the case here, does not lose his right of removal, such permission being in effect a new lease, though only for a brief time.

Tiffany's Landlord and Tenant, pp. 1593, 1595.

Trusting that we have given you the desired information, we are,

Yours respectfully,

WILLIAM K. OTIS,

Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,

Corporation Counsel.

APRIL 24, 1911.

HON. CHARLES F. SEYFERLICH, Fire Marshal.

Dear Sir:

Your communication of the 24th inst. addressed to the Corporation Counsel at hand, in which you state that at the time Morgan Park was annexed to the city there was one paid man in the fire company of the town. You ask if he can be kept on the payroll or if his service must be dispensed with on account of the Civil Service Law.

Section 17 of Article I of an Act entitled "An Act to provide for annexing and excluding territory to and from cities, towns and villages, and to unite cities, towns and villages," approved April 10, 1872, provides that all policemen and firemen lawfully in the employ of any city, village or incorporated town, the whole of which may be annexed to another under the act, are transferred to and become a part of the police and fire department force of such city, village or incorporated town.

While there is, of course, a conflict between the section of the Annexation Act just adverted to and the Civil Service Law, the former act must be treated here as special and the latter as general. Therefore the former should prevail and the man in question becomes a part of the Fire Department of the City of Chicago by virtue of the act without examination or further ceremony.

I am forwarding a copy of this opinion to the Chairman of the Civil Service Commission.

Very truly yours,

MACLAY HOYNE,

First Assistant Corporation Counsel.

APRIL 24, 1911.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

In compliance with the request of the Corporation Counsel I herewith submit an opinion on the question of the tenure of office of the members of the Board of Local Improvements and the power of the Mayor to remove same.

A determination of this question is dependent upon the question whether the Local Improvement Act should be interpreted independently of the general provisions of the Cities and Villages Act relating to municipal officers or whether the two Acts should be construed together in that regard as Acts in *pari materia*. According to my view the Local Improvement Act is a full and complete code relating to local improvements intended to cover the entire subject and independent of any other Act which may happen to contain general provisions referring to some matter in the former.

It is "a general revision of all the laws theretofore existing in relation to local improvements." *Village of Melrose v. Dunnebecke*, 210 Ill. 422 (424). The statute "has provided what is intended to be a complete code governing a proceeding for making a local improvement by special assessment." *Gage v. City of Chicago*, 216 Ill. 107 (111). The Act was meant to be separate and distinct from other Acts and to cover fully and completely the matters contained in it, and the necessity for the aid of any general statutory provisions to supplement or explain it was not contemplated. Nor is there any need in the present case to report to the Cities and Villages Act to supply any omissions or defects in the Local Improvement Act in respect to the terms of office of the members of the Board of Local Improvements.

The Board of Local Improvements is created by the Local Improvement Act and all the duties and powers of the Board are derived from that Act. The manner of appointment of the members of the Board is prescribed by the Act and the only powers conferred by the Act upon the City Council in this regard are those of confirming the appointment and fixing the salaries of the Board. Section 6 of the Act which contains these provisions is in part as follows:

"In cities within the terms of this act, having a population of one hundred thousand (100,000) or more, by the last preceding census of the United States, or of this State, there is hereby created a board of local improvements, consisting of five members; such five members shall be nominated by the mayor and shall be confirmed by the council or board of trustees of such city; and no one of which shall be the head of any department of the government of such city, or hold any other office or position therein. Said board shall elect from its members a president, a vice-president and an assistant secretary. The superintendent of special assessments shall be ex-officio secretary of the board. In the absence or the inability of the president or the vice-president to act, the vice-president for the president, and the assistant secretary for the vice-president, are hereby given full power to sign and execute contracts, vouchers, bonds, pay-rolls and all other papers, documents, and instruments necessary to carry this act and all proceedings hereunder into full force and effect. Said board shall

hold daily sessions for the transaction of all business in rooms accessible to the public, to be provided by the city council.

The city council or board of trustees of such city shall provide for salaries for said board of local improvements. * * *

It will be observed that the tenure of office of the members of the board is not fixed and that the manner of their removal is not provided for. But the rule is universal that where an office is created by appointment and a definite term is not prescribed, the office is held at the pleasure of the appointing power and the incumbent may be removed at any time. Throop on Public Officers, Sec. 304; 29 Cyc. 1371. The further rule is equally well settled that where an officer is removable at pleasure, no cause for removal need be assigned. Throop on Public officers, Sec. 304. And a removal may be effected by the appointment of another person. *Holbrook v. Township Trustees*, 22 Ill. 539. So that it is apparent that there are no omissions or defects in the Local Improvement Act in this particular which would require a recourse to the general provisions of the Cities and Villages Act in order to render the former Act intelligible or effective. The general rules of statutory construction supply the omissions and we are justified in resorting to these rules to interpret the Act as an independent piece of legislation rather than in construing it in connection with the general provisions of the Cities and Villages Act which were never intended to apply to it. In other words, in the construction adopted we are simply treating the Local Improvement Act as a full and complete code on the subjects contained therein which I think is clearly in accordance with its spirit and intent.

If the question involved a construction of the Local Improvement Act alone no difficulty whatever would be presented. The tenure of office of the members of the board would be at the pleasure of the Mayor and he could remove them at any time without assigning any reason therefor.

But it is necessary to further determine whether the general provisions of the Cities and Villages Act prescribing the term of office and the manner of removal of officers of the city

change in any way the conclusion above stated. These provisions are as follows:

“All officers of any city, except where herein otherwise provided, shall be appointed by the mayor (and vacancies in all offices except the mayor and aldermen shall be filled by like appointment) by and with the advice and consent of the city council. The city council may by ordinance not inconsistent with the provisions of this act prescribe the duties and define the power of such officers, together with the term of any such office; Provided the term shall not exceed two years.” Section 6 of Article VI.

“The Mayor shall have power to remove any officer appointed by him of any formal charge, whenever he shall be of the opinion that the interests of the city demand such removal, but he shall report the reasons for such removal to the council at a meeting to be held not less than five days before nor more than ten days after such removal; and if the Mayor shall fail or refuse to file with the city clerk a statement for the reasons of such removal or if the city council by a two-thirds vote of its members authorized by law to be elected, by yeas and nays, to be entered upon its record, disapprove of such removal, such officer shall thereupon become restored to the office from which he was so removed; but he shall give new bonds and take a new oath of office. No officer shall be removed a second time for the same offense.” Section 7 of Article II.

In my opinion the above provisions (which apply to municipal officers generally) in no way affect or control the appointment or removal of the members of the Board of Local Improvements. These officials being created by a special Act for a particular purpose and being subject to the control of the municipality only insofar as the Act specifically provides, occupy a different status from other municipal officers generally. It would not be proper statutory construction, therefore, to construe the general provisions of the Cities and Villages Act in connection with the Local Improvement Act which is a special act on a particular subject. Such a construction would be opposed to the manifest intent of the latter Act, and in conflict with its scope and purpose. Furthermore, there is no necessity of interpreting these Acts as statutes *in pari materia* since there is no conflict between them on

the point in question that requires harmonizing and no words or phrases in that regard in the Local Improvement Act which are obscure or uncertain. *C. & N. W. Ry. Co. v. City of Chicago*, 148 Ill. 141 (159). But even if the necessity did exist for construing the two Acts together, then according to the rules of statutory construction, the Local Improvement Act, which is a special Act containing provisions in respect to the creation, appointment, salaries and duties of the Board of Local Improvements, should be excepted from the operation and effect of the general provisions of the Cities and Villages Act relating to officers of the city generally. "A particular and specific statutory provision will prevail over a general one on the same subject in another statute, and will be treated as an exception thereto." *Dahnke v. The People*, 168 Ill. 102. "The special mention of one thing indicates that it was not intended to be covered by a general provision which would otherwise include it." *C. & N. W. Ry. Co. v. City of Chicago*, 148 Ill. 141 (159); Endlich on Interpretation of Statutes, Sec. 399.

On the same principle it would follow that the express provisions in the Local Improvement Act on those subjects, namely, the creation, appointment, duties and salaries of the Board, would indicate a clear intent to exclude from the City Council any power to legislate on any matters relating thereto, except as may be clearly granted by the Act. This view is strengthened when we further consider the fact that the Local Improvement Act has expressly delegated to the City Council the power to consent to the appointment of the members of the Board and to fix their salaries and granted no further powers in this regard. Manifestly if the legislature had intended that the Council should have had any other authority in relation to the members of the Board such, for instance, as fixing their term of office, it would undoubtedly have said so. It is hardly necessary to cite authority on the proposition that on matters contained in the Local Improvement Act the City Council can exercise only such power as the Act may expressly confer. However, the case of *Walker v. City of Chicago*, 202 Ill. 531 (534) will illustrate the rule. In that case it was held that the Council has no authority to direct the

Board of Local Improvements to originate an improvement for the reason that "no power is conferred upon the City Council in that regard."

In this view of the question the City Council does not possess the power to fix the terms of office of the members of the Board of Local Improvements and, therefore, the ordinance of June 8, 1908, prescribing such terms of office is, in my opinion, to that extent void for want of authority. The ordinance referred to is as follows:

"1576. MEMBERS—SALARIES.) The five members of the Board of Local Improvements who may be appointed by the Mayor and confirmed by the City Council of the City of Chicago under the terms of an act of the general assembly of the State of Illinois, approved May 25, 1908, entitled 'An Act to amend Section 6 of An Act entitled, "An Act concerning local improvements," approved June 14, 1897, in force July 1, 1897, as amended by the act approved and in force May 9, 1901,' shall receive as salary, from the City of Chicago for their services as members of such Board of Local Improvements, the sum of four thousand dollars per annum; provided, however, that the president of said Board of Local Improvements shall receive as salary the sum of five thousand dollars per annum, such salaries to be paid out of the appropriation from the Board of Local Improvements.

1577. TERMS OF OFFICE.) The persons acting as such members of the Board of Local Improvements at the date of the passage of this ordinance shall hold their offices until the first Monday in July, 1908, and until their successors shall have been appointed and shall have qualified. The persons thereafter appointed by the Mayor and confirmed by the City Council in accordance with the provisions of said act shall be appointed biennially and shall hold their offices for two years and until their successors shall have been appointed and shall have been qualified.

1578. BONDS.) Before entering upon the performance of the duties of his office each member of the Board of Local Improvements so appointed and confirmed shall execute to the City of Chicago a good and sufficient bond with sureties to be approved by the City Council in the penal sum of twenty-five thousand dollars, conditioned upon the faithful performance and discharge of the duties of such office as prescribed and required by law and by the orders and ordinances of the City of Chicago."

For the reasons stated I am of the opinion that the members of the Board of Local Improvements hold their offices at the pleasure of the Mayor and are removable by him at any time without a statement of the causes for such removal.

Very respectfully yours,

FRANK JOHNSTON, Jr.,
Assistant Corporation Counsel.

Approved:

PHILIP J. McKENNA,
Attorney for The Board of Local Improvements.
W. H. S.
Corporation Counsel.

APRIL 25, 1911.

HON. E. J. MAGERSTADT, City Collector.

Dear Sir:

We have your letter of April 18, referring to the vote taken on April 4, 1911, in certain annexed portions of the Town of Cicero, relative to the issuing of dramshop licenses, and inquiring what effect this vote has upon the issuing of licenses by you in the territory affected.

Upon investigation we find the facts to be as follows: On April 25, 1889, an act of the legislature went into effect, known as the Annexation Act (Hurd's Revised Statutes, 1909, Sections 211-233), Section 18 of which provides substantially that "when a part or the whole" of any town, village, etc., is annexed to a city, and prior to the annexation a prohibition or local option ordinance existed in the territory so annexed, such ordinance shall remain in force notwithstanding the annexation. At the time of the passage of this law there was a local option ordinance in force in the Town of Cicero providing that no dramshop license should be issued except upon the petition of a majority of legal voters residing within one-half mile of the proposed dramshop (Revised Mun. Code of Chicago, 1905, p. 736). This ordinance remained in force in the town until June 26, 1889, when the trustees repealed it and passed a prohibition ordinance covering all that part of the town not already annexed to the city (*Id.* p. 738).

On April 29, 1889, that is, after the Annexation Act took

effect and before the repeal of the Cicero local option ordinance as stated, certain portions of the town became annexed to the City of Chicago as indicated upon the attached plat, with the result that the local option ordinance referred to remained in force in this annexed territory. This ordinance was recently construed by the courts to mean that a new petition of voters within the half mile radius was required in order to obtain, not only the original dramshop ordinance, but each succeeding annual license at the same place (*People ex rel. Kearns v. Busse*, Appellate Court, G. N. 15146), and the vote taken April 4, 1911, was on the question of a repeal of the ordinance, in the manner provided by the statute in both of the annexed portions of Cicero over which the ordinance in question extended.

Section 18 of the Annexation Act, after providing as already stated for the retention of prohibition and local option ordinances in annexed territory, contains the following provision for their repeal:

“Provided, the city council or board of trustees as the case may be may, on petition of one-fourth of the voters of the territory over which said ordinance extends, submit at an annual municipal election, but not oftener than every other municipal election, the question to the voters of such territory whether or not an ordinance shall be passed authorizing the issuing of dramshop licenses for such territory. * * * The ballots cast at such election shall be written or printed, or partly written and partly printed, ‘for dramshops’ or ‘against dramshops,’ respectively, and shall be received, canvassed and returned the same as ballots cast at said election for municipal officers, and if it shall appear that a majority of the voters so voting upon the question vote ‘for dramshops,’ then licenses may be issued for said territory on the same terms and conditions as licenses are granted by ordinance within other parts of the municipality.”

Proceeding under this language a petition was, on February 20, 1911, introduced in the City Council (C. P. 3979), purporting to be signed by one-fourth of the voters in the territory described as follows:

“All that part of the City of Chicago bounded on the north by the Illinois and Michigan Canal, on the east

by South Western avenue, on the south by West 39th street, and on the west by South 40th avenue produced from the north;

And all that part of the City of Chicago bounded on the north by West North avenue, on the west by North and South 48th avenue, on the south by West 12th street, and on the east by North and South 40th avenue;

And all that part of the City of Chicago bounded on the north by West 12th street, on the east by South 40th avenue, on the south by West 39th street and the Illinois and Michigan Canal, and on the west by the Chicago and Western Indiana Railroad right of way, formerly South 46th avenue."

Following the recommendation of the Committee on License the Council, on April 6, 1911, (C. P. 4098) passed an order which, after reciting the presentation of the petition, read as follows:

"ORDERED, That the question whether or not an ordinance shall be passed authorizing the issuing of dram-shop licenses for such territory shall be submitted to the voters of said hereinbefore described territory in the manner prescribed by statute at the next annual municipal election to be held in said City of Chicago on April 4, 1911."

This order was certified by the city clerk to the Election Commissioners and submitted to the voters of the above described territory at the municipal election held April 1st last, in the form prescribed by the statute. The votes cast were canvassed as for one district, that is, treating the affected territory as an entirety, and on April 17, 1911, there was submitted to the City Council and published (C. P. 4461) a certified copy of an order entered in the County Court April 10, 1911, showing the result of the vote as 5566 to 4779 in favor of a repeal of the local option ordinance.

It is contended by counsel for the Garfield Park Protective Association that the vote taken was invalid for the reason that the annexation of the territory lying south of the Illinois and Michigan Canal and that extending from 39th street north to North avenue (both marked "A" on the plat) were separate transactions, it appearing from the proceedings of the County Board for April 29, 1889, that these two districts presented separate petitions for annexation and were annexed

by separate resolutions of the Board in the manner provided by Section 21 of the Annexation Act. The fact that each of the two districts was annexed upon its own distinct petition is said to entitle each district to preserve its own identity to the extent of voting separately upon the repeal of the local option ordinance.

Even if the natural justice of this position were to be conceded we do not think that the language of the statute justifies such a conclusion. Section 18 begins by saying that "when a part or the whole" of a town is annexed, its dramshop ordinance shall remain in force, and the use of the word "part" in this place is supposed in some way to limit the application of the provision for a repeal to each part as *separately annexed*. If, however, as is the case here, several parts of the town are annexed, leaving a portion which is not annexed, it is obvious that the annexed parts, even though brought in by separate votes and at different dates, are in the aggregate, nevertheless, only "a part" of the former town and fall strictly within the language of the act.

But the part of Section 18 which in our opinion applies directly to the question now presented is the proviso which indicates under what conditions a vote to repeal may be taken. "On petition of one-fourth of the voters of *the territory over which said ordinance extends*" the City Council is authorized to submit the question of a repeal to the voters of such territory. This is precisely what was done here. The voters of all the annexed part of Cicero over which the ordinance extended petitioned together and voted together. "The territory over which the ordinance extends" can not reasonably be construed to mean a part of such territory or anything less than all of it, nor is there any expression in the statute which seems to us to require or in fact to justify separate petitions or separate votes in the parts of the town which were separately annexed.

We think that this view is strengthened by the language of the second proviso of Section 18, which, in case the voters in the territory over which the ordinance extends circulate a petition as above set forth and threaten to bring on a vote to repeal the ordinance, provides a method by which any part of

the territory affected, not less than one-half square mile in extent, may protect itself against the effect of the vote in the entire territory. This may be done by submitting to the City Council a counter petition, to be signed by one-fourth of the voters in such part, asking that the question of repeal be submitted to them separately. If the question of repeal were required in the first instance to be submitted separately in the annexed portions as separately annexed, this safeguard provided for territory smaller in extent than that "over which the ordinance extends" would hardly seem necessary.

In the present case such a counter petition was in fact submitted to the Council on March 20, 1911, (C. P. 4183), referred to the Committee on License, and on the recommendation of this committee placed on file March 27, 1911, (C. P. 4273). The committee found this petition insufficient as to the number of signers, and although their action in this respect is complained of we are unable to see how the question can now be reopened except by the Council itself. Under the statute these petitions are required to be submitted to the Council for action, and this imposes on the Council the duty to determine their sufficiency.

Our conclusion, in which alone we presume you are interested, is that the vote taken April 4, 1911, on a repeal of the Cicero local option ordinance is valid upon its face, and that unless the result is altered by a recount or otherwise it is now your duty to issue dramshop licenses in the territory affected without requiring petitions signed by a majority of the legal voters residing within one-half mile of the proposed place of business.

Yours respectfully,
WILLIAM K. OTIS,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

APRIL 26, 1911.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

I herewith hand you six resolutions which pertain to six mandamus proceedings relative to the reinstatement on the

police force of the six persons referred to in the resolutions aforesaid.

As is indicated by the resolutions, each of the police officers involved, immediately following the entry of the order of court reinstating him, executed an instrument purporting to release the City of Chicago from all liability for back salary, damages for discharge, etc., and recited in conclusion, that the city by the acceptance of the alleged release thereby waived all right to presecute an appeal from, or writ of error basd upon, the order for mandamus.

In my opinion, the Corporation Counsel of the City of Chicago has not and never had authority to either accept or reject on behalf of the city the proposition therein contained to waive error and appeal in consideration of such alleged release. But on the contrary I am of the opinion that the only authority empowered to pass on that question on behalf of the City of Chicago is the City Council. In order, therefore, that the question of acceptance or rejection of the releases may be determined by the only branch of the municipal government authorized to pass on the subject, I have caused the resolutions accompanying this communication to be prepared and would respectfully recommend that they be presented to the City Council at its next meeting.

I deem it to the best interests of the city that speedy action be taken concerning these resolutions.

Respectfully,

WILLIAM H. SEXTON,

Corporation Counsel.

CHICAGO, APRIL 28, 1911.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

The Corporation Counsel has referred to me a communication from the Secretary of your Committee under date of April 27th, transmitting a claim of Ringling Bros. for a rebate of \$50.00 on account of the nonuse of an amusement license, and also a communication of E. J. Magerstadt, City Collector.

It appears from the communication of the City Collector to the Chairman of the Committee on Finance that on April

1st, 1911, there was issued to Ringling Bros., an amusement license to conduct a circus for a period of twenty-three days, the fee paid therefor being at the rate of \$50.00 per day, and that it was agreed between the City Collector and the representative of the above company that in the event that said licensee did not operate for the full period of twenty-three days, that he would recommend to your honorable body that said licensee be given a refund for such days as said licensee failed to give any performances, and that on account of the death of one member of the firm of Ringling Bros. no performances were had on April 3, 1911.

An opinion is requested, first, as to the liability of the city for said refund, and second, as to the right of the city to make said refund.

Section 106 of the Chicago Code of 1911 classifies all circuses under the 13th Class, and Section 110 exacts a license fee of \$50.00 per day for entertainments of the 13th Class where such entertainments are given in any place having a seating capacity of more than 3,000 persons, but not more than 6,000 persons.

Under these circumstances the applicant for a license could have made application every day for a new license, but in order to save time and avoid inconvenience said applicant took out one license for the entire period of twenty-three days for which said applicant expected to give entertainments in this city.

It is a well settled principle of law that where a person, in the absence of fraud or mistake pays money voluntarily and without compulsion or duress of person or goods, and not under protest, he cannot afterward recover it back, and this is so even though the ordinance under which the money was paid is invalid.

City of Chicago v. Ernst Klinkert, 94 Ill. App. 524.
Holder v. City of Galena, 19 Ill. App. 409.

The City Collector had no authority to enter into any agreement whereby any portion of the license fees were to be refunded because of nonuser, and it is a general principle of law that a person dealing with a municipal officer is supposed to know the extent of his authority. I am, therefore,

of the opinion that there is no legal obligation on the part of the City of Chicago to refund said \$50.00.

I wish to say further, however, that in the case of *Chicago v. P. C. C. & St. L. Ry. Co.*, 244 Ill. 220, the Supreme Court, speaking through Mr. Justice Cartwright, enunciated the doctrine that "a city is not entirely exempt from all the rules of honesty and fair dealing that are applicable to individuals and private corporations."

In view of the facts in this case I believe that although no legal duty is imposed on the city to refund said license fee, yet a moral obligation exists, such as would govern the conduct between individuals, to refund said sum of \$50.00, and in case this were done neither your Committee nor the City Council would subject itself to adverse criticism, nor to liability on the part of any citizen or taxpayer.

I return herewith the communications of E. J. Magerstadt and Ringling Bros.

Yours very respectfully,

GEORGE E. DIERSSEN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

APRIL 29, 1911.

WILLIAM CARROLL, Esq., City Electrician.

Dear Sir:

Your communication of the 20th instant addressed to Hon. William H. Sexton, Corporation Counsel, attaching letter from City Real Estate Agent addressed to you, and also attaching copy of letter from the Geis Printing Company addressed to the City, wherein the City is notified to take precautions to protect the foundations of the city sub-station lighting or power plant building located on Blue Island avenue against damage growing out of the removal of the lateral support to the city building by reason of the Geis Company excavating for foundations for a new building on its property immediately south of the city property, and wherein you ask for an opinion from this department as to whether, under the terms

of the so-called city lighting contract entered into between the Sanitary District and the City, it is the duty of the city or the Sanitary District to do the work incident to the safeguarding of the city property, has been referred to the writer for reply.

The contract entered into between the Sanitary District and the City appears in the Council Proceedings of October 3, 1910, on pages 1445 to 1454, inclusive, and it is therein provided that the City shall yield to the Sanitary District the possession and use of certain of the City sub-stations lighting plants and electrical equipment of the City, in order that the District may use and operate the same in carrying out the arrangement therein provided for the furnishing by the District to the City of the electrical energy required for the operation of the present arc lighting system of the City, and also for the operation of ten thousand additional arc lights which are to be supplied by the District for the lighting of city streets, public places, etc.

Under Section 12 of the contract it is provided that such possession and use by the District shall continue for a period of seven years, and under Section 14 of the contract the compensation to be paid by the City to the Sanitary District for the supplying of electrical energy is provided for. This arrangement, in effect, establishes the relation of landlord and tenant between the City and the Sanitary District in the use and occupancy by the Sanitary District of the properties turned over to it by the city under the contract.

By Section 8 of the contract it is provided:

"Said District agrees to accept, receive and take over the possession of such sub-stations, transformers regulators, meters, machinery, tools, appliances, transmission lines and other electrical equipment described in Exhibit A hereto attached, and hereby agrees to superintend, repair, manage and operate the same during the life of this contract, and will furnish without cost to said City all necessary supplies, material and labor to maintain and keep the same during the life of this contract in as good repair as when delivered to said District, depreciation from wear and tear excepted. * * *"

The status of the Sanitary District is, therefore, analogous to that of a tenant who enters into the possession of prop-

erty with a distinct covenant on the part of such tenant to not only make necessary repairs upon the property during the term of such tenancy, but also a further covenant that at the expiration of the term it will yield up possession of the property in the same condition as when received, less ordinary wear and tear.

The duty of the tenant under such covenants has been passed upon by our Supreme Court and has been so rigidly construed as to devolve upon the tenant the duty of replacing buildings on leased land which have been destroyed by fire.

See *Ely v. Ely, et al.*, 80 Ill. 532; also exhaustive footnote appended to *Boardman v. Howard*, 64 L. R. A., pages 657 to 661, inclusive.

I am of the opinion, in view of the holdings of our courts relative thereto, that under the covenant to yield up possession of the property at the expiration of the term in the same repair as when received, the Sanitary District has clearly obligated itself to protect this property under the circumstances which have now arisen, and its failure so to do would be construed to be a premissive waste of the property on the part of the tenant (the Sanitary District).

See: 9th Ill. Cyc., pages 405-406, and cases therein cited.

Also: American Digest, Cent. Ed. Vol. 48, p. 2114.

Immediately upon receipt of your communication, realizing its urgency, I took this question up with the attorney representing the Geis Company and with Mr. Edward B. Ellicott, Electrical Engineer of the Sanitary District, and was informed by Mr. Ellicott that the District was giving the matter the needed attention.

Very respectfully,

OSCAR H. OLSEN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

APRIL 29, 1911.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

In the matter of the application of Mr. Ike Daniels for a license to keep a saloon in the premises known as 18 East 14th street, near the corner of Michigan avenue and 14th street, it appears that the property in question is owned by the city; that pursuant to an ordinance passed February 17, 1908, certain premises (including the premises in question) were leased by the city to one Edward T. Noble for a term of ten years beginning May 1, 1908, to be used solely for store and residence purposes. The lease as executed contained a clause to the effect that no part of said premises should at any time during the term be kept as a saloon, or intoxicating liquors kept for sale in or upon the said premises. One Charles Hasterlik as assignee of the lease subsequently filed a bill in the Circuit Court of Cook County to have the lease reformed in certain particulars, and on June 17, 1908 a decree was entered in that case reforming the lease by excluding and expunging therefrom the paragraphs thereof prohibiting the use of the premises as a saloon and the subletting or assignment of the premises without the consent of the city.

The last paragraph of the decree of June 17, 1908 is as follows:

"In entering this decree the court has not intended, and does not intend, to hold or find that the complainant or said lessee, or any other person, has the right under said lease to occupy or use said premises or any part thereof for a saloon or for the sale of intoxicating liquors."

It will be observed that the lease as reformed merely provides that the premises are to be used for store and residence purposes.

Under the above stated conditions I am of the opinion that there is no legal obstacle to the granting of the license applied for. Of course, this office is not called upon to pass upon the question of what policy the city may see fit to adopt in respect to issuing licenses to keep saloons on property owned by the city. This is not a legal question and no opinion is expressed thereon.

If the license applied for is issued, the city should be properly protected by bond against damages that it may be liable for under the Dramshop Act by reason of permitting a saloon to be kept on property owned by the city.

Yours respectfully,

BRYAN Y. CRAIG,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

MAY 1, 1911.

HON. CHARLES M. THOMSON, Alderman, 25th Ward, Chicago.

Dear Sir:

Your letter of the 29th ultimo to William H. Sexton, Corporation Counsel, relative to the requirements of the ordinances of Chicago regulating the location of garages, laundries, hospitals, theaters, stores and saloons on boulevards, and asking whether the City of Chicago has the right to pass ordinances regulating the location of the above named occupations on or along boulevards and whether these regulations could be made more stringent than those applying to residence streets, has been referred to me for answer.

Answering your inquiry in regard to frontage consents required for the location of the above named occupations in The Chicago Code of 1911, I beg leave to advise you that frontage consents are required to be secured before a permit can be obtained to construct or maintain a garage in any block in which *two-thirds* of the buildings on both sides of the street are used exclusively for residence purposes, or within 100 feet of any such street in any such block (Sections 716 and 2684 of The Chicago Code of 1911);

That frontage consents are required for a laundry to be run by machinery where one-half of the buildings on both sides of the street in the block in which the laundry is located are used exclusively for residence purposes, or within 50 feet of any such street (Section 712 of The Chicago Code of 1911);

That frontage consents are required to be secured before a permit can be obtained "to build, construct and maintain,

conduct or manage a hospital in any block in which two-thirds of the buildings fronting on both sides of the street or streets on which the proposed hospital may front are devoted to exclusive residence purposes" (Section 265 of The Chicago Code of 1911) ;

That frontage consents are required to be secured before a permit is given to construct or erect any building designed or intended to be used for the purpose of presenting or carrying on any entertainment for which a license is required by the city ordinances (Sections 117 and 715 of The Chicago Code of 1911) ;

That frontage consents are required by our city ordinances to be secured before a permit can be given "to locate, build or construct any store for the sale at retail of goods, wares and merchandise, on any street in any block in which *all* the buildings are used exclusively for residence purposes" (Section 712½ of The Chicago City Code of 1911) ;

And that frontage consents are required in order to secure a license to conduct a saloon in certain annexed territory to the city, the requirements varying in different portions of the annexed territory, but not based upon the question of whether the saloon is located on a boulevard.

Answering your further question as to whether the City Council has the right to pass ordinances applicable to boulevards only regulating the above enumerated classes of business, I beg leave to advise you that in several cases where such provisions have been enacted our Supreme Court have held the particular acts unconstitutional. In the case of the *City of Chicago v. The Gunning System*, 214 Ill., 641, 642, where the ordinance provided that no billboard should be erected upon any boulevard or pleasure drive or in any street where three-fourths of the buildings in such street are devoted to residence purposes without the consent, in writing, of at least three-fourths of the residents and property owners on both sides of the street in the block in which it is desired to erect such board, Mr. Justice Wilkin of our State Supreme Court said :

"The purpose of Sections 4 and 5 (being the sections in question) seem to be mainly sentimental and to pre-

vent sights which may be offensive to the aesthetic sensibilities of certain individuals residing in or passing through the vicinity of the billboards. The extreme restrictions placed on the erection or maintenance of such boards, and the license fee placed thereon, indicate that these sections were intended to be prohibitive rather than regulative, and are, in our judgment, unreasonable."

In the more recent case of *Haller Sign Works v. Physical Culture Training School*, decided April 19, 1911, where the validity of a state law was attacked which made it "unlawful for any person, firm or corporation, to erect, or cause to be erected, a structure of any kind or character within 400 feet of any public park or boulevard within the limits of any city in this state having a population of 100,000 or more, for the purpose of placing advertisements of any kind or character thereon; and that all billboards and advertising signs of whatever kind or character that are occupying space contrary to this act shall be removed within one year after the date of the passage of this act," Mr. Justice VICKERS said:

"There is nothing inherently dangerous to the health or safety of the public in structures that are properly erected for advertising purposes. * * * The application of this statute is limited to structures placed within five hundred feet of boulevards and public parks. If the placing of such structures within five hundred feet of boulevards or public parks is dangerous or otherwise detrimental to the public welfare, it is difficult to see why the same structures would not be equally so if placed within the same distance from any other public street or public grounds. A boulevard is a public street which is usually of greater width than ordinary business streets and is given a park-like appearance by reserving space at the sides or center for shade trees, flowers, seats and the like, and ordinarily is not used for heavy teaming. It is usually set apart for pleasure driving rather than the general business purposes of an ordinary street.

These suggestions lead unmistakably to the conclusion that the statute in question is an attempt to exercise the police power purely from aesthetic considerations, disassociated entirely from any relation to the public health, morals, comfort or general welfare. However desirable it may be to encourage an appreciation of the beautiful in art and to cultivate the taste of the people of the State, still it has never been the theory of our

government that such matters could properly be enforced by statute when not connected with the safety, comfort, health, morals and material welfare of the people. Advancement along these lines, whether wisely or unwisely, has, so far, been left to the schools and colleges and the influence of social intercourse. The citizen has always been supposed to be free to determine the style of architecture of his house, the color of the paint that he puts thereon, the number and character of trees he will plant, the style and quality of the clothes that he and his family will wear, and it has never been thought that the legislature could invade private rights so far as to prescribe the course to be pursued in these and other like matters, although the highly cultured may find on every street in every town and city many things that are not only open to criticism but shocking to the aesthetic taste. The courts of this state have with great unanimity held that *the police power cannot interfere with private property rights for purely aesthetic purposes.*"

In my opinion an ordinance with more stringent frontage consent requirements on boulevards than in other portions of the city for any of the restricted occupations mentioned in your letter (except saloons) would, under the views expressed by our Supreme Court in the Haller Sign case, *supra*, be construed as for aesthetic purposes, and for this and other legal reasons would be unreasonable and void.

Cities, villages and towns are given the charter power "to license, regulate and *prohibit* the selling or giving away of any intoxicating, malt, vinous, mixed or fermented liquor, * *

* (Clause 46th, Chapter 24, Cities, Villages and Towns Act), and under this broad grant of power our Supreme Court in the case of *Martens v. The People*, 186 Ill. 314, held that an ordinance of the City of Moline was valid which provided that a saloon should not be established in a block where no saloon then existed unless the application should be accompanied by a petition signed by two-thirds of the freeholders in such block praying that such license be issued, and a license issued without such petition was held void; and in the case of *Harri-son v. The People*, 195 Ill. 469, an ordinance passed by the Village of Hyde Park and now in force in that annexed territory, required that an application for a saloon license "shall be signed by a majority of the property owners according to

frontage on both sides of the street in the block upon which such dramshop is to be kept, and shall also be signed by a majority of the *bona fide* householders or persons or firms living or doing business on each side of the street in the block upon which such dramshop shall have its main entrance," and this ordinance requiring frontage consents for a saloon license was held valid where no distinction was made between residence and business property, and, in accordance with our charter power and the opinions expressed in the cases of *Martens and Harrison v. The People, supra*, and other decisions of our state courts, I am of the opinion that an ordinance with reasonable frontage consent requirements for saloons fronting upon boulevards and public parks could be sustained, providing it was so drafted as not to conflict with the frontage consent ordinances for saloons in the annexed territories containing such requirements and was reasonable in its terms.

Respectfully submitted,

WILLIAM S. STAHL,

Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,

Corporation Counsel.

MAY 3, 1911.

H. B. WHITE, Esq., Secretary, Committee on Finance.

Dear Sir:

Since writing to you concerning the above entitled matter under date, of May 1, I have examined the petition of the claimant for damages and have seen the premises in question, and beg to say:

In my opinion the petition does not state a legal claim for damages against the city, the claim being for loss of profits caused by the lowering of the grade of South Western avenue in front of and near the said premises. There is no allegation that the work has been negligently done by the city or that there has been any greater obstruction than has been necessary in order to carry on the work. I am convinced that the partial obstruction of the street has been necessary and has been only temporary. The sidewalk up to the present time has

not been obstructed. I am told that the work will be finished in one month or less.

That the loss of profits and damages for temporary obstruction of a street occasioned by a public improvement thereof cannot be recovered from the city is well established in this State.

Osgood v. City of Chicago, 154 Ill. 194.

Hohmann v. City, 140 Ill. 226.

Sanitary District v. McGuirl, 85 Ill. App. 392.

Noonan v. City of Chicago, 121 Ill. App. 185.

City of Chicago v. Spoor, 190 Ill. 340.

City of Chicago v. McShane, 102 Ill. App. 239.

Lefkovitz v. City of Chicago, 228 Ill. 23.

In view of the fact that there is no legal damage which the claimant may recover from the city, I am returning herewith the petition and papers attached thereto.

Very truly yours,

CLARENCE N. BOORD,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

MAY 8, 1911.

DR. WM. A. EVANS, Commissioner of Health.

Dear Sir:

We have a communication from Benj. Perry, M. D. Chief Food Inspector of May 5th, 1911, addressed to Edward J. Brundage, Corporation Counsel and forwarded by Mr. Brundage to this department.

The question asked by Mr. Perry is as to the right of the Health Department to enforce the food inspection ordinances and the Health Department regulations pertaining thereto, including the making of demands for milk store, milk depot, milk wagon, ice peddling wagons and carbonated beverage factory licenses in the territory of Morgan Park, and as to whether the above regulations may be enforced at the present time.

It has been the opinion of this Department heretofore,

that upon the annexation all the ordinances of the annexing city extend over the annexed territory, with the exception, under certain conditions, of dramshop licenses.

This department has held in regard to the annexation of Morgan Park, that after April 4th, 1911 all the ordinances of the City of Chicago were in force in the territory formerly under the jurisdiction of the Village, from which it follows that all the ordinances and health regulations, which are referred to, are now enforceable by the authorities of the City of Chicago.

Very truly yours,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

MAY 8, 1911.

BOARD OF TRUSTEES OF THE FIREMEN'S PENSION FUND, Chicago.

Gentlemen:

On the 21st ult. your Board referred to the Corporation Counsel the petition of Joseph P. O'Brien, with a request for an opinion as to the legality of his claim to a pension from the firemen's pension fund. The matter has been referred to me by the Corporation Counsel.

It appears from the statements in the petition that the applicant became a member of the Fire Department on May 3, 1904; that at different times while a member of the Fire Department he sustained injuries, and that on June 8, 1910, he was discharged from the Fire Department by the Civil Service Commission upon charges preferred against him by Chief Horan for leaving quarters without permission.

The petition does not show, nor do the records of the department, that applicant previous to his discharge was found upon examination by a medical officer, ordered by the Board of Trustees, to be physically or mentally permanently disabled, by reason of service in such department, so as to render necessary his retirement from service in such Fire Department, as required by Section 7 of the Firemen's Pension Act.

I am of opinion, therefore, that your Board would have no legal right to grant to the applicant a pension based upon disability.

The only express provision contained in the act for the granting of a pension to a discharged fireman is contained in Section 10 thereof, which provides that:

“Any member of the Fire Department of any such city, village or incorporated town, after having served twenty-two years or more in such Fire Department, of which the last two years shall be continuous, may make application to be relieved from such Fire Department, or if he shall be discharged from such Fire Department, the said Board of Trustees shall order and direct, etc. *
* *”

It appears from the petition that the applicant at the time of his discharge had only served about six years in the department, so that he is not eligible to a pension under Section 10.

I am of the opinion, therefore, that the applicant is not entitled to a pension under the provisions of the Firemen's Pension Act, and that your Board has no legal authority to grant same.

Yours respectfully,

OSCAR H. OLSEN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

MAY 8, 1911.

HON. JOHN E. TRAEGER, Comptroller.

Dear Sir:

Your Communication of May 5th, with attached bills of certain employes of the Village of Morgan Park, together with your request for an opinion as to the city's liability for these expenses and how they shall be met, are received.

Section 4 of “An Act to provide for the annexation of cities, incorporated towns and villages, or parts of same, to cities, incorporated towns and villages,” approved and in force April 25, 1889, (Hurd's Revised Statutes of 1908, page 346) provides in part that:

“The city, village or incorporated town to which the whole of another city, village or incorporated town is annexed under the provisions of this act shall assume and pay any and all debts, liabilities, bonds or obligations and interests thereon of the city, incorporated town or village so annexed, and shall become vested with title and ownership of all property belonging to said city * * *.”

The debts and obligations shown by the attached statements, however, relate to a period dating from April 15th to April 30th, 1911, 11 days after the annexation of the Village of Morgan Park to Chicago became effective. An analysis of the bills shows that the different items are for work performed by various classes of officers and employees.

The officers of the Village of Morgan Park were ousted from their offices on the date of annexation, and from that date, in my opinion, have been no longer officers and not entitled to compensation. This applies to the Superintendent of Public Works, Village Treasurer, and Village Clerk.

Regarding policemen, by the provisions of the annexation act, they are transferred to the City of Chicago and are entitled to pay from the date of annexation in the rank in which they are qualified by the Civil Service Act and rules. The day laborers, not being under Civil Service, and their work since annexation having been acquiesced in by the city authorities, are entitled to payment.

The Chief of the Volunteer Fire Department, if he is a regular village official, is entitled to be placed upon the fire department payroll under Civil Service, in accordance with Section 17 of the act hereinabove quoted. It is not apparent from the bill whether he is a mere volunteer or “a fireman lawfully in the employ of the village.”

Section 5, Rule VI of the Civil Service Commission provides that:

“Upon the annexation of any territory to the City of Chicago, persons then in the regular employment of the municipal government or school authorities which theretofore exercised jurisdiction over the territory so annexed, performing public service within such annexed territory, shall be eligible for temporary appointment to positions like those they held respectively, such temporary appointment to remain in force not exceeding sixty days

and until regular appointments can be made under the provisions of the Civil Service Law, from eligible registers resulting from examinations in which citizens of such annexed territory have an opportunity to participate.”

The employes, therefore, other than officers and day laborers, of the former Village of Morgan Park, in order to receive compensation for work performed for the City of Chicago since annexation, should receive a temporary sixty day appointment. In this class are the Chief Engineer, Assistant Chief Engineer and Electrical Engineer at the water works.

This disposes of all of the persons whose claim for services is shown by the attached statements.

As to the question of there being no funds available to meet those expenses, I beg to call attention to the fact that the Village Treasurer of the former Town of Morgan Park has, I am advised, informed Mr. Harvey of your office that he has several thousand dollars on hand which will be available for the city's use as soon as his books are audited.

Very truly yours,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

MAY 9, 1911.

HON. FRANCIS D. CONNERY, City Clerk.

Dear Sir:

Your letter of the 5th instant, addressed to the Corporation Counsel, in which you inquire whether the cancellation and return of the surety bonds filed in December last by the Central Trust Company of Illinois, The Pullman Trust & Savings Bank and The Roseland State Savings Bank as depositaries of the city's funds for 1911, are authorized and proper by reason of the fact that the City Council on April 17, 1911, approved certain other bonds as substitutes for said bonds first above mentioned, has been referred to me and in reply I beg to say:

The bonds filed in December by the above named banks

and approved by the City Council on December 19, 1910, contain the following recitals:

“The condition of the above obligation is such that, whereas, the above bounden principal has been designated by the City Council of the City of Chicago, as a depository of the funds and moneys of the said city in amount not exceeding Dollars, for the year 1911, in accordance with the laws and ordinances in such case made and provided; and

WHEREAS, the City of Chicago may, from time to time, deposit with said principal its funds and moneys accordingly; * * *”

These bonds, according to their terms and strict interpretation thereof, cover moneys deposited in the year 1911 and do not cover moneys deposited prior to January 1, 1911, and on deposit at that date. In other words, these bonds according to their terms are not retroactive and each of them covers only deposits made on or after January 1, 1911.

The surety companies' bond of the Central Trust Company of Illinois, in the sum of one million dollars, dated February 4, 1911, approved by the City Council on April 17, 1911, as a substitute for the bond of the same company filed in December, 1910, contains the following recital:

“The condition of the above obligation is such, that, whereas, the above bounden principal has been designated by the City Council of the City of Chicago, as a depository of the funds and moneys of the said city in amount not exceeding One Million (\$1,000,000) Dollars *for the year 1910* in accordance with the laws and ordinances in such case made and provided; * * *”

There is an error in the date in the underscored phrase of the above quoted recital, so that on its face the deposits secured are those made in the year 1910 instead of 1911. This is probably a clerical error, but such errors in bonds of this amount should not be lightly passed over.

The personal bonds of The Pullman Trust & Savings Bank and The Roseland State Savings Bank, dated March 2, 1911, approved by the City Council on April 17, 1911, as substitutes for bonds of said banks filed in December, 1910, contain the following recitals:

“The condition of the foregoing obligation is such,

that, whereas, said * * * Bank has been designated by the City Council of the City of Chicago as depositary of the funds and moneys of said City *for the year* in an amount not exceeding * * * Dollars in accordance with the laws and ordinances in such case made and provided;”

It will be noticed that these bonds do not state the time during which the deposits secured are to be made. It is, of course, to be inferred that the above quoted language refers to deposits in the year 1911, subsequent to March 2, 1911, but in bonds of this character the time within which such deposits are to be made should not be left to inference.

The surety companies' bonds of the said banks were executed on January 31 and February 4, 1911, and were approved by the City Council on April 17, 1911. They are not retroactive, and according to a strict interpretation of their terms, they secure only the funds deposited subsequent to the dates of their execution and do not secure those deposits which were in said depositaries on January 1, 1911, or the deposits which were made between that date and the dates of their execution.

It has been suggested that the said substitute bonds approved by the City Council on April 17, 1911, as aforesaid, secure the payment of all city funds now on deposit with these various depositaries by reason of the transfer on April 19, 1911, of all the deposits in the said depositaries from the account of Isaac N. Powell, former City Treasurer, to Henry Stuckart, the present City Treasurer, and that such transaction between the depositaries and these officials was an accounting or payment within the defeasance clause of the bonds and also constituted a new deposit of the city's funds. The defeasance clause in all of the said bonds is substantially as follows:

“Now, therefore, if the said principal shall well and faithfully perform and discharge its duties as such depositary, and pay out the funds and moneys so deposited with it, or any part thereof, in accordance with the warrant, check or direction of the duly authorized officials of said city, and shall account for and pay over all moneys received by it as such depositary in accordance with the laws and ordinances of said City of Chicago,

then this ordinance to be void; otherwise, it shall be and remain in full force and effect."

These transactions on April 19, 1911, relating to the city funds on deposit in the city depositaries were as follows:

Mr. Powell drew checks upon the various depositaries, which checks were accepted by said depositaries and thereupon delivered by Mr. Powell to Mr. Stuckart who in turn delivered said checks back to said various depositaries. These checks were stamped paid and the funds of the city were then transferred to the account of Mr. Stuckart as treasurer. These transactions were, in my opinion, transfers upon the books of the various depositaries of the accounts of the funds of the city therein deposited from the name of the outgoing treasurer to that of the incoming treasurer, and that by and through these transactions the depositary did not "pay out the funds and moneys so deposited with it, or any part thereof, in accordance with the warrant, check or direction of the duly authorized officials of said city" and did not "account for and pay over all moneys received by it as such depositary in accordance with the laws and ordinances of said city of Chicago" as required by the above quoted defeasance clause of the bonds securing such deposits.

It seems to me that this construction of the transactions of April 19, 1911, is strengthened by the following clause from Section 7 of the Act of May 18, 1905, page 338, Hurd's Rev. Statutes, 1908:

"When money is once deposited in such depositary or depositaries, no check or draft shall be drawn against such deposits unless accompanied by a warrant attached thereto, drawn in accordance with the provisions of Article VII of the act above referred to by its title, a duplicate of such warrant to be retained by the treasurer."

According to this provision the outgoing city treasurer had no power to draw his check upon the various depositaries for the purpose of having the funds paid to him and accounted for in such manner as to release the sureties on the bonds of said depositaries. Such payment and accounting could be made only upon warrants signed by the Mayor and countersigned by the Comptroller in the usual form of city warrants.

In view of the fact that even if the clerical error above

pointed out in the surety companies' bond of the Central Trust Company of Illinois, and the indefiniteness and uncertainty above referred to in the personal bonds of The Pullman Trust & Savings Bank and The Roseland State Savings Bank be disregarded, the substitute bonds approved by the City Council on April 17, 1911, secure only those deposits made after the dates of their execution, I am of the opinion you should not cancel or surrender the surety bonds of the Central Trust Company of Illinois, The Pullman Trust & Savings Bank filed in December, 1910, until such time as new substitute bonds shall be filed which cover and secure the city funds now on deposit in said depositories and funds which may hereafter be deposited therein during the year ending December 31, 1911.

Very truly yours,

CLARENCE N. BOORD,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

MAY 11, 1911.

R. B. PEATTIE, Esq., c/o The Tribune, Chicago.

Dear Sir:

The letter of J. W. T. addressed to "The Friend of the People" which you transmitted to the Corporation Counsel on the 3rd instant, has been referred to me and in reply I beg to say:

The suit concerning which your correspondent inquires was an action in equity begun in the Circuit Court of Cook County on December 12, 1900. It was brought by Frederick C. Hale and a number of other persons for the purpose of enjoining the Peoples Gas Light & Coke Company from charging and collecting from the complainants \$1.00 per M. cubic feet for fuel gas which had been theretofore furnished by the Hyde Park Gas Company or the Mutual Fuel Gas Company at the rate of 72 cents per M. cubic feet.

Upon a consideration of the bill of complaint, the answer thereto and the evidence in support thereof, Judge Edward F. Dunne granted a temporary injunction as prayed for in

the bill of complaint. From this injunction the Peoples Gas Light & Coke Company appealed to the Appellate Court where the injunction order of the lower court was reversed and the cause remanded.

See *Peoples Gas Light & Coke Company v. Hale et al.*, 94 Ill. App. 406.

Mr. Justice Windes wrote the opinion of the court and therein it was held that the Hyde Park Gas Company and the Mutual Fuel Gas Company had the right, power and authority under their ordinances and franchises to charge \$1.00 for fuel gas when such gas was of the same quality as the illuminating gas which was furnished at the same price, and that the fact that these companies had furnished such fuel gas for 72 cents per M. cubic feet did not obligate the Peoples Gas Company, which had taken over the rights, franchises and obligations of the said companies, to furnish such fuel gas at a rate of less than \$1.00 per M. cubic feet. At page 418 the Court said:

“Section 11 of the ordinance, which has been quoted in full in the statement, as we construe it, did not permit the Mutual Company to charge for its gas furnished for illuminating purposes more than \$1 net per thousand feet, and if it furnished a gas for heating purposes (which we think includes fuel purposes), if inferior to the gas which it furnishes for illuminating purposes, it should not charge more than seventy-two cents net per thousand cubic feet; but as the company did not furnish an inferior gas it was not obliged to furnish an illuminating gas that complied with the test of the ordinance for that kind of gas, to be used as a fuel or heating gas, at the net price of seventy-two cents per thousand cubic feet.”

Again at page 420 the Court said:

“The fact that the Mutual Company, and after it the appellant, furnished a high grade gas and permitted consumers to use it for fuel purposes, and charged only seventy-two cents for it when so used, did not bind appellant to continue such permission at that price.”

Again at page 424 the Court said:

“The fact that the Mutual Company and appellant furnished to consumers the high grade gas at seventy-two cents for fuel purposes, does not establish that \$1 for that gas is excessive or unjust, it appearing at the same time that they also received \$1 for the same gas when used

for illuminating and that the prevailing price in Chicago charged for illuminating gas when used for fuel is \$1."

The effect of this decision is that the Peoples Gas Light & Coke Company in charging \$1.00 per M. cubic feet for fuel gas did not violate the ordinances of the Village of Hyde Park or the statute authorizing and providing for the consolidation of gas companies.

After the filing of the mandate of the Appellate Court in the Circuit Court, Judge Dunne refused to set the cause for hearing and dismissed the bill for want of equity. From this decree an appeal was taken to the Appellate Court where the decree of the Circuit Court was reversed with order to remand the cause again to that court.

See *Hale v. Peoples Gas Light & Coke Company*,
102 Ill. App. 364.

In the opinion it was held that the Circuit Court should have set the cause for trial upon its merits.

An examination of the records of the clerk of the Appellate Court and also of the clerk of the Circuit Court discloses the fact that no mandate was ever issued from the Appellate Court ordering the Circuit Court to act in accordance with the opinion of the Appellate Court, and that no further proceedings in the case were taken or had in the Circuit Court. By reason of this fact the cause stands dismissed or abandoned by operation of law under Section 114, Chap. 110, Hurd's Rev. Stat. 1908, which provides that "if neither party shall file such transcript within two years from the time of making the final order of the Supreme Court or Appellate Court, as the case may be, reversing any judgment or proceeding the case shall be considered as abandoned, and no further action shall be had therein."

I hope that you will pardon the delay in answering your request and that the foregoing will furnish you the desired information.

I am returning herewith the letter of your correspondent.

Very truly yours,

CLARENCE N. BOORD,
Assistant Corporation Counsel.

MAY 17, 1911.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

Your favor of the 25th inst. addressed to the Corporation Counsel, wherein you request an opinion as to the right of the city to expend for subway purposes, moneys from the appropriation fund, known as 6S1, has been referred to me.

This appropriation in the budget is as follows:

“6S1—Services, benefits, claims and refunds payable from deposit from Chicago Railways Company, as per Section 25 of ordinance of February 11, 1907”,.....\$35,000.00

The question involved in this matter was settled by the case of *James G. Barsaloux et al. v. City of Chicago*, 245 Ill. 598. In that case the court held that the city

“may expend for such purpose, either the special traction fund or any other available corporate fund belonging to the city.”

It is, therefore, my opinion that the city may expend such fund for subway purposes.

Respectfully submitted,

LEE D. MATHIAS,

Assistant Corporation Counsel.

Approved:

MACLAY HOYNE,

Acting Corporation Counsel.

MAY 17, 1911.

FRANCIS D. CONNERY, Esq., City Clerk.

Dear Sir:

We beg to acknowledge receipt of your communication of the 13th inst., asking us to advise you whether the handing to you on May 12th, 1911, of the acceptance and bond of Rudolph Schuessler was a compliance with the ordinance of March 6, 1911.

The ordinance appears to have been passed by the Council on March 6th and contained a provision that the ordinance should take effect and be in force from and after its passage and approval, provided that a written acceptance of the ordinance and a bond in accordance with the requirements thereof should be filed within sixty days of the passage of the ordi-

nance. It further appears, that the ordinance, while it passed the Council on March 6, 1911, did not receive the approval of the Mayor, and did not go into effect until the next regular meeting of the Council, which was held on March 13th. The presentation of the acceptance and bond for filing was within the sixty days from March 13th.

This ordinance grants to Schuessler a special privilege: The privilege of constructing and maintaining a canopy over the sidewalk in Ogden avenue. It is a well settled principle of law that statutes and ordinances of this character are to be construed most strongly against the party taking the special privilege and in favor of the public. This principle was enunciated and applied by the Supreme Court of the United States in its decision on the question of the statute commonly known as the 99-year act.

It will be noted that in the 6th section of this ordinance, a distinction is taken between "passage and approval" and "passage". The ordinance is to take effect and be in force from and after its passage and approval but the acceptance and bond are to be filed within sixty days after the *passage*.

Taking this into account, and applying the principle of construction above stated, we are of the opinion that it was incumbent upon Schuessler to file his acceptance and his bond within sixty days after the actual passage of the ordinance by the City Council, that is, within sixty days after the 6th of March, 1911.

In further confirmation of this view, we may note that both in his acceptance and in his bond, Schuessler recites that the ordinance was *passed* on the 6th of March.

In answer to your query, we, therefore, advise you that the acceptance and bond of Rudolph Schuessler were not presented for filing in time to constitute a compliance with the ordinance.

Yours respectfully,

WILLIAM DILLON,
Assistant Corporation Counsel.

Approved:

MACLAY HOYNE,
Acting Corporation Counsel.

MAY 18, 1911.

HON. MURDOCH CAMPBELL, Commissioner of Buildings.

Dear Sir:

The Corporation Counsel has referred to me your letter dated May 13, 1911, wherein you ask us to advise you in reference to the issuing of permits for buildings proposed to be erected on Twelfth Street, where same is to be widened.

In response to this request, I beg to state that a bill for the condemnation of the south side of Twelfth Street, No. 285,721, has been filed in the Superior Court of Cook County on April 17, 1911, title of said case being *City of Chicago v. James F. Lord*. Since this bill for condemnation has already been filed, the question presents itself as to whether owners of property can still continue to make improvements on the side of the street affected by the aforementioned proceeding, and then compel the city to pay for them.

In looking over the decisions of the different states as to what is the fixed definite point of time when compensation to property owners should be estimated, there is a diversity of decisions. In the States of Illinois and Massachusetts the decisions are clear and uniform. In both of these states the courts hold that compensation to be paid by the city and received by the owners of property, must be estimated according to the value of the property at the time of the filing of the petition of condemnation, and that municipalities are not liable for increase of value of property by reason of improvements made by the owners after the filing of the bill for condemnation.

Burt v. Merchants Insurance Co., 155 Mass. 114.

M. O. W. Ry. v. City of Boston, 173 Mass. 425.

Cook v. South Park Commissioners, 61 Ill. 115.

South Park Comm'rs v. Dunley, 91 Ill. 49.

Du Puis v. Chicago & Northwestern, 115 Ill. 97.

Chicago, Evanston & Lake Superior v. Catholic Bishop of Chicago, 119 Ill. 525.

Concordia Cemetery Assn. v. Minnesota & Northwestern R. R. Co., 121 Ill. 199.

Schreiber v. C. & E. R. R. Co., 115 Ill. 340.

Chicago & State Line Ry. Co. v. James Mines, 221 Ill. 448.

Mr. Lewis, in his work on Eminent Domain (para. 662) says:

“Up to the point of the filing of the petition, the owner may put improvements upon his property and recover their value; but after the point which is considered the time when damages are to be assessed, improvements are made at the risk of being taken without compensation.”

There is nothing in any of the foregoing cases, or any case which I have been able to find, which gives to the city the authority to prevent or prohibit any one from improving his property if he sees fit to do so. On the contrary the right of an owner to use and enjoy his property until it is actually taken is unquestioned.

Gilkey v. Watertown, 141 Mass. 317.

This further question suggests itself as to whether or not the city, by issuing a permit to an owner to put improvements on his property, is not afterwards estopped from refusing to compensate the owner for the additional improvements made under this permit.

Section 229 of The Chicago Code of 1911 makes it mandatory that before a person or corporation can proceed with the erection or alteration of any building or structure, he shall first obtain a permit from the building commissioner, without which permit it is unlawful to proceed to erect or repair any building. In Section 720 of The Chicago Code of 1911 a penalty is provided for upon the violation of the foregoing. It would, therefore, be ludicrous to say that a man has a right to enjoy and improve his property as he sees fit until his property is actually taken by the municipality, and then, at the same time, to take the position that the city has a right to refuse a permit and the further right to impose severe penalties upon any person who improves his property without a permit before his property is actually taken. I am of the opinion, therefore, that the city can not legally refuse to issue a permit to any person upon proper demand.

Webster's unabridged dictionary defines "permit" as a "warrant; license; leave; permission; specifically, a written license or permission given by a person or persons having authority."

The permit is granted at the request of the person desiring to make the improvement and in issuing a permit the city does nothing further than to say that it has no objections to the improvements contemplated as far as it is concerned; but if the person does improve or build, he builds with notice of his rights and privileges, as well as the rights and privileges of the city under the law.

However, I would advise as an additional precaution, that in these cases where permits are required for improvements on property on Twelfth Street on the side to be condemned, that special permits be given, calling attention to the pending condemnation proceeding and that the city does not, by the issuance of said permits, waive any of its rights or privileges under the law.

Very respectfully yours,

MAX M. KORSHAK,

Assistant Corporation Counsel.

Approved:

MACLAY HOYNE,

Acting Corporation Counsel.

MAY 19, 1911.

HON. JOHN E. TRAEGER, City Comptroller.

Dear Sir:

In your communication of the 8th inst., you enclose a notification from the attorney of John P. Allen, who claims the right to exercise the duties of the office or place of employment known as Assistant Superintendent of Water Pipe Extension. In this notification the jurisdiction of the Circuit Court to enter judgment in the case of *People ex rel. Kiernan v. City of Chicago* on March 28, 1911, is questioned.

The notification in question recites that the said judgment is void because of lack of jurisdiction of the court over the subject matter; that plaintiff Kiernan started his suit on September 24, 1904; that several months later the case was dismissed on motion of the petitioner and that it was reinstated in 1910 on motion of the petitioner to vacate the previous order of dismissal. Numerous authorities are cited in the notification in support of Mr. Allen's position. It concludes with the claim that you are without right to take any

steps toward paying Kiernan any salary for services that he may perform under the said pretended reinstatement and void judgment, and warns you that you, the Commissioner of Public Works, and the City Treasurer will be held personally responsible for paying out money.

I have been informed today that under the said judgment of March 28, 1911, Mr. Kiernan has been performing the duties of Assistant Superintendent of Water Pipe Extension and that Mr. Allen is also being carried on the pay-roll in consideration of performing the same services.

There is now pending before Judge Petit of the Circuit Court a motion by counsel for Allen to vacate the order of March 28, 1911, and to permit Allen to be made a party defendant to the said pending case. It is the duty of the fiscal officers of the City of Chicago to see that only one of the contestants is paid.

It has always been the policy of Mayor Harrison to obey writs of mandamus issued by the Circuit Court or Superior Court judges pending appeal in the absence of exceptional circumstances. If Mr. Kiernan is working under said order of March 28, 1911, he should receive the compensation attached to the office of place of employment, and Mr. Allen should not receive said compensation. If said order is set aside, Mr. Allen should receive the compensation and Mr. Kiernan should not receive it. As I shall transmit a copy of this communication to the Commissioner of Public Works and the City Treasurer, I will say here that Kiernan and Allen should not both be permitted (if they are being permitted) to perform the duties of the same place of employment.

For your further guidance, I now turn to a discussion of the principles of law which must control. So long as the officer who is actually performing the duties of the office receives the compensation, there is no danger that the city or you or the other city officers above mentioned will be subject to any additional or double liability.

I am assuming for the purpose of this discussion that Mr. Allen was originally appointed to the office under the ordinary forms of law, and, therefore, is, at least, a *de facto* officer. I am of the opinion that if the order of March 28, 1911, is not

vacated and Mr. Kiernan continues to perform the duties of that office under the ordinance, that he also would be, at least, a *de facto* officer, because his reinstatement under the judgment affords him, at least, color of title.

A *de facto* officer is "one who actually performs the duties of the office with apparent right under claim of color of appointment or election."

Lavin v. Comrs. of Cook Co., 245 Ill. 496, 505.

People v. Lieb, 85 Ill. 484, 488.

The courts have frequently recognized that a person who is in office by virtue of an erroneous judgment is acting under color of title.

School Directors v. Tingley, 72 Ill. App. 471.

Commissioners v. Anderson, 20 Kas. 298.

Brown v. Tama Co., 122 Ia. 745.

Dolan v. Mayor, 68 N. Y. 274.

In *Brinkerhoff v. Jersey City*, 64 N. J. L. 225, 239, it was held that a *de facto* officer who has performed the duties of the office during a certain period is entitled to the emoluments of the office during such period although there was a *de jure* officer having a present right to the office. See also :

Erwin v. Jersey City, 60 N. J. L. 141, 149.

Lavin v. Comrs. of Cook Co., 245 Ill. 506.

Burgess v. Davis, 138 Ill. 578, 582.

Auditors of Wayne Co. v. Benoit, 20 Mich. 176, 181-184.

In *Stone v. Wetmore*, 42 Ga. 601, the court refused to interfere by injunction with a *de facto* officer in the collection of his fees holding that for purposes of public policy an officer *de facto* may do legal acts though his title to the office is defective, and saying (p. 602) :

"The same public policy which establishes this rule prevents the courts from interfering to disturb the *de facto* officer in the receipt of the fees. If he works he must live."

The Stone case is cited with approval in *Lavin v. Commrs. of Cook Co.*, 245 Ill. 496, and *Burgess v. Davis*, 138 Ill. 578-582. In the Burgess case, it was said (p. 582) :

"Public policy will prevent the courts from inter-

fering to disturb a *de facto* officer in the receipt of the fees. * * * The enjoyment of the fees, profits and advantages of the office are so connected with the proper discharge of the duties of the office itself that they cannot be separated."

To the same effect is:

Tappan v. Gray, 9 Paige 507, 509 (Affd. 7 Hill 259).

Guillotte v. Poincy, 41 La. Ann. 333, 336.

Lawrence v. Leidigh, 58 Kas. 676, 678.

In *Dolan v. Mayor*, 68 N. Y. 274, it was held that payment to a *de facto* public officer of the salary of the office made while he was in possession was a good defense to an action brought by the *de jure* officer to recover the same salary after the *de jure* officer had regained possession. It was there said:

"* * * It is plain that in many cases the duty imposed upon the fiscal officers of the state, counties or cities to pay official salaries could not be safely performed unless they are justified in acting upon the apparent title of claimants. * * * If fiscal officers upon whom is imposed the duty to pay official salaries are only justified in paying them to the officer *de jure*, they must act at the peril of being held accountable in case it turns out that the *de facto* officer has not the true title; or, if they are not made responsible, the department of the government they represent is exposed to the danger of being compelled to pay the salary the second time. It would be unreasonable, we think, to require them, before making payment, to go behind the commission, and investigate and ascertain the real right and title. Disbursing officers charged with the payment of salaries have, we think, the right to rely upon the apparent title and treat the officer who is clothed with it as an officer *de jure*, without inquiring whether another has a better right. Public policy accords with this view."

To the same effect is:

Comms. v. Anderson, 20 Kas. 298.

which is even a stronger case, and

Brown v. Tama County, 122 Ia. 745.

From the facts stated above, and from the authorities cited, I therefore conclude: First: A judgment of a court of competent jurisdiction placing or reinstating a person in a public office or place of employment clothes him with color of title to the same extent that a person duly appointed to

office under the ordinary forms of law is clothed with such title. Second: That the Commissioner of Public Works, in view of the Mayor's policy, should permit Mr. Kiernan to continue to perform the duties of the office of Assistant Superintendent of Water Pipe Extension if he has been performing them since March 28, 1911, until said order is either vacated or the judgment reversed upon appeal. If Mr. Kiernan has not been performing the duties of the office, I would suggest that in order to prevent any disturbance in the work of the department, he not be placed in possession until the determination of the motion to vacate said judgment of March 28, 1911, now pending before Judge Petit. Third: That whoever performs the duties of the office, whether it be Mr. Kiernan or Mr. Allen (but only one of them should be permitted to perform said duties), should receive through the necessary action of the Comptroller and City Treasurer, the compensation attached to said office. Fourth: That if the compensation attached to the office is paid to the person in possession of it who is discharging its duties, such payment will furnish a complete defense for the city to any action by the other claimant, even if ultimately it be declared that he was the *de jure* officer. Fifth: That said payment of compensation just mentioned will furnish a complete defense to any action brought against the Commissioner of Public Works the Comptroller or City Treasurer based on their alleged personal liability for making said payment.

I have made no examination of the authorities cited in the notification served upon you by Counsel for Allen which it is said establish the proposition that Judge Petit was wholly without jurisdiction to enter the order of March 28, 1911. If the order of March 28, 1911, stands, and the motion to vacate it is denied, an appeal will be taken by the city from such judgment, but in the meantime the writ of mandamus should be obeyed. If the order is vacated Allen should hold his position.

Yours very truly,

MACLAY HOYNE,
Acting Corporation Counsel.

CHICAGO, MAY 19th, 1911.

WILLIAM CARROLL, Esq., City Electrician.

Dear Sir:

We beg to acknowledge your communication of May 9th, 1911, enclosing copies of bids, specifications, letters, etc., relative to the purchase of 25,000 feet of No. 6 B. & S. G. rubber covered, lead incased electric light cable, requesting an opinion as to whether or not you can let the contract for same to the lowest bidder, the Western Electric Company, who fail to comply with one paragraph of the specifications which require that the bidder in submitting his proposal "must state thickness of wall of insulation, external diameter, and a price per foot at which he will furnish the cable", which requirement the Western Electric Company attempted to comply with several hours after the bids were open and another bidder had protested on the ground that the Western Electric Company's bid did not conform to the requirements of that provision of the specifications above quoted.

It is the theory and practice of the law that all bidders for public work shall be treated alike. Afforded equal opportunities and subjected to the same restrictions, it would be unjust to ask that a bidder who neglected or failed to comply with the requirements of the advertisement or specifications by omitting from his bid essential requirements, such as thickness of wall of insulation, external diameter, etc., should be considered on an equal footing with those who have followed the requirements of the advertisement in this respect. We believe, therefore, that bidders who have complied with the terms of the advertisement should have the preference over those who have not, and that the only safe course for you to pursue is to disregard those bids which are not complete in themselves and lacking in essential requirements. To decide otherwise would be to establish a precedent which might open the doors to favoritism and partiality and thus controvert the underlying principles of competitive bidding.

The rule is stated thus in the 20th American & English Encyclopedia of Law, 2nd Edition, at page 1167:

"Where reasonable requirements have been prescribed as to the manner of bidding, such requirements

must be complied with in order that a bid shall be entitled to consideration." Citing many authorities.

It should also be observed that all bids must be considered as of the time set for their opening; that bidders must stand or fall on the proposals filed by them at that time, and should not be permitted afterwards to change or supplement the same, except possibly in the case of an error in computation or some other mistake which is apparent on the face of the proposal. This rule is forcibly expressed in the case of *Beaver v. Trustees Blind Asylum*, 19 Ohio St. 97, where it was said:

"The proposals are to be in writing and sealed and the action of the trustees is to be taken on the basis of what those proposals are found to be when open and not on what they may have been intended to be but are not. To hold otherwise would be to nullify or reverse the evident policy of the statute and to render possible and easy the exercise of such favoritism by the trustees toward the particular parties as it is the obvious policy and intention of the statute to render impossible. The contract or contracts shall be awarded to and made with the person or persons who shall offer to perform the labor and furnish the materials at the lowest price. How offer to perform and furnish? Through the medium of written, sealed proposals filed within the time limited in the advertisement. The statute knows no other proposals or offers but these. The trustees are invested with no discretion in the matter."

The Supreme Court of this State in the case of *Chicago v. Mohr*, 216 Ill. 320, has said:

"The principle declared in all of these cases is that the board or body who are empowered to open the sealed bids and award the contract had power under the law to accept or reject the bids, as submitted and sealed, but that they had no power, if the bids were open, to permit material amendments or changes to be made in the terms or conditions of the bids; that the only proposals or bids which the law could recognize were those which were made, sealed and filed within the time limited in the advertisement calling for bids."

In the present case, the thickness of the wall of insulation, external diameter, etc., of the cable is required to be enclosed and submitted with the sealed proposal and is one of

the essential requirements and should be regarded as a part of the proposal, and the reasons which prohibit changes in proposals after they are open clearly apply with equal force in this case.

For the foregoing reasons, it is believed that you are not justified in considering the bid of the Western Electric Company in awarding this contract.

Respectfully submitted,

P. W. SULLIVAN,

Assistant Corporation Counsel.

Approved:

MACLAY HOYNE,

Acting Corporation Counsel.

MAY 22, 1911.

HON. WILLIAM R. PARKER, Chairman, Committee on Health Department.

Dear Sir:

The Corporation Counsel has referred to me for attention your communication of recent date requesting an opinion as to the validity of a proposed ordinance, transmitted therewith, declaring jimson, burdock, rag-weeds, thistles, cockle-burs and other weeds of like kind, of a height of more than one foot, or any vegetable growth which exhales unpleasant or noxious odors, or any high and rank vegetable growth which may conceal filthy or decaying deposits, growing on private property to be a nuisance. And providing further that the owner, occupant or person in charge of the premises, upon which they grow, shall remove the same upon notice so to do from the Commissioner of Health, and providing a penalty for failure to comply with such notice.

The validity of such an ordinance depends upon the power of the City Council to enact the same.

I find among the express powers granted to the City Council in Section 1 of Article V of the Cities and Villages Act, the following:

“Seventy-fifth—To declare what shall be a nuisance, and to abate the same; and to impose fines upon parties who may create, continue or suffer nuisances to exist.

“Seventy-eighth—To do all acts, make all regula-

tions which may be necessary or expedient for the promotion of health or the suppression of disease.

“Sixty-sixth—To regulate the police of the city or village, and pass and enforce all necessary police ordinances.

“Ninety-seventh—To pass all ordinances, rules, and make all regulations, proper or necessary, to carry into effect the powers granted to cities or villages, with such fines or penalties as the city council or board of trustees shall deem proper. * * *”

I have examined various authorities with reference to the weeds specifically mentioned in said proposed ordinance to ascertain their characteristics, particularly with reference to their effect upon health and personal comfort, and have gathered the following information concerning them:

Jimson Weed (also known as Virginia weed and stink-weed)—

“Where the plant grows abundantly, its vicinity may be detected by the rank odor which it diffuses to some distance around. The fresh leaves when bruised emit a fetid narcotic odor, which they lose upon drying.”

United States Dispensatory, 19th Ed., page 1182.

“Certain species are poisonous.”

Principal Poisonous Plants of the United States, page 50—book published in 1899 by Illinois State Board of Health.

Burdock Weed—

“Produces itching, contains alkaloid lappine.”

Manual of Poisonous Plants by L. H. Pammel, Vol. I, page 137.

Ragweed—

“It is best known to medicine because the presence of pollen in the nares is believed to be the principal cause or occasion of the disease hay fever.”

Reference Handbook of the Medical Sciences, Vol. VI, page 835.

Thistle—

“Acts injuriously ‘in a mechanical way’ (meaning by touch or contact).

Cockle-Bur—

“The young seedlings said to be poisonous to horses and animals.”

Manual of Poisonous Plants by L. H. Pammel, Vol. I, page 137.

“City and village authorities under the general grant

of power over nuisances have no power to adopt an ordinance declaring a thing to be a nuisance which is in fact not clearly so; but in doubtful cases, where a thing may or may not be a nuisance, depending upon a variety of circumstances requiring judgment and discretion on the part of such authorities in the exercise of their legislative functions, their action is conclusive of the question."

Laugel v. City of Bushnell, 96 Ill. App. 618; affirmed 197 Ill. 20.

North Chicago City Railway Co. v. Town of Lake View, 105 Ill. 207.

In the case of *City of St. Louis v. Galt*, 63 L. R. A. 778, the Supreme Court of Missouri passed upon the validity of an ordinance somewhat similar in its provisions to the proposed ordinance and upheld its validity. Said ordinance provided in substance that the owner, etc., of any lot or ground who shall allow or maintain on any such lot any growth of weeds, to a height of over one foot, shall be deemed guilty of a misdemeanor and upon conviction subject to a certain fine. The word "weeds" was defined in the ordinance to include "all rank vegetable growth which exhale unpleasant and noxious odors, and also high and rank vegetable growth that may conceal filthy deposits."

On page 780 of said report the court uses the following language:

"* * * The word 'weed' has a common, every-day meaning to the mind of every man. It may also have a technical meaning to the botanist or the chemist. It is a nuisance to the farmer, the gardener, or the owner of a well-kept lawn, notwithstanding that some weeds may contain valuable medicinal properties, which, when extracted, may be of benefit and profit to mankind. But it is a fact of common information, of which courts may properly take judicial notice, that a high, rank growth of weeds in a populous community has a strong tendency to produce sickness and to impair the health of the inhabitants, and so may be a nuisance in such locality, notwithstanding they may be comparatively innocuous in the country when far away from human habitation."

Certain of the weeds before mentioned may be found growing in sections of the city where they would not be considered detrimental to the health and comfort of the inhab-

itants of the city, yet if permitted to grow and mature, the seed from such weeds would be disseminated by the wind and in other ways and sprout in localities where such weeds would be regarded as nuisances.

I am of the opinion that the weeds specified in said proposed ordinance have such characteristics that they might be regarded as nuisances in a populous community, and that, if so regarded, such an ordinance would be valid.

I return herewith draft of proposed ordinance.

Very truly yours,

GEORGE E. DIERSSEN,
Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,
Corporation Counsel.

MAY 25, 1911.

HON. JOHN MCWEENY, General Superintendent, Department
of Police.

Dear Sir:

In your communication to the Corporation Counsel you request an opinion with reference to certain warrants for collection against certain railroads for services of policemen detailed at crossings during the month of November, and as to whether or not this is a proper charge to be made against these companies, I beg to advise you:

My investigation discloses that these policemen were arbitrarily stationed by Chief Stewart at the crossings of these certain railroads without authority of the railroads and without any contractual relation existing between the city and the railroads as to the services and payment of these policemen so stationed at these crossings.

The question of the collection of this money involves the proposition primarily of the police power of the city.

I find that by Section 63, Article V of the city charter, the city has the right to pass and enforce all necessary police ordinances and regulate the police of the city. The enforcement of the ordinances and the regulation of the police of the city is directly imposed upon the Chief of Police. The

Chief's duties are defined in the following sections of The Chicago Code of 1911:

"1915. DUTY TO PROTECT PERSONS AND PROPERTY.)

He shall be charged with the duty of protecting the rights of persons and property, providing a proper police force at every fire, protecting strangers and travelers at steamboat landings and railway stations, and causing to be enforced all ordinances of the city."

"1916. DUTY TO ABATE NUISANCES, ETC.) He shall take notice of all nuisances, impediments, obstructions and defects in the streets, avenues, alleys and public places of the city, and shall remove the same, or cause immediate notice thereof to be given to the proper officer whose duty it may be to take measures in relation thereto, according to the ordinances of the city."

"1921. SPECIAL PATROLMEN FOR SPECIAL DUTY.) He shall have power, on the application of any person or persons showing the necessity therefor, to appoint and swear in any additional number of special patrolmen to do special duty at any fixed place within the city, at the charge and expense of the person or persons by whom the application is made, and shall keep a correct list of all persons so appointed. * * *"

With reference to the above ordinance and the charges imposed upon the railroads, I find nothing which gave Chief of Police Stewart any right to impose upon the railroads a tax for the policemen detailed or stationed at the railroad crossings, and particularly, with reference to Section 1921, the facts in this case show that there was no application of any railroad, or of any person or persons which showed the necessity for any additional number of special patrolmen to do special duty at any fixed places upon these crossings, but rather, the Chief in the performance of his regular duties (See Section 1915 of the Chicago Code of 1911) stationed the regular patrolmen at these crossings to protect the general public at the said crossings, which was his duty as Chief of Police.

In *City of Chicago v. Weber*, 246 Ill. 305, the powers of the city to exact compensation for firemen stationed at the different theaters of the city settled the question as to the right of the city to impose upon public corporations or quasi-public corporations a tax for city firemen specially detailed

at such corporation's buildings or railroad crossings, as in this case.

The court held in this case:

"The power of a city to compel theater owners to employ and pay a city fireman to be present at each performance is not expressly given nor is it essential to the declared objects and purposes of the municipal corporation."

The court further held:

"The fact that an ordinance requiring the attendance of a city fireman at theaters is a provision for the safety of the public and is embraced within the city's power to regulate the police and pass and enforce all necessary police ordinances does not determine the question of the city's right to compel the owners of the theaters to pay for the services of such fireman.

"The city has no power, express or implied, to require persons conducting theaters to employ and pay firemen, to be detailed by the fire marshal of the city from the regular city fire department, to attend each performance and perform duties in furtherance of the public safety."

See also *City of Chicago v. Chicago Union Traction Co.*, 199 Ill. 259.

It has also been held in *Chicago and Northwestern Railway Co. v. City of Chicago*, 140 Ill. 309, that the provisions for the safety of the public come within the police power of the city, particularly with reference to crossings over railways. This, however, does not determine the question of the right of the city to compel the railroad companies to pay for such services rendered by the police department to the public.

In *City of Chicago v. Weber*, *supra* (page 310) the language of the court states:

"If there is power to charge the expenses of performing that public duty to the owner of a theater there is also power to do the same thing with respect to other owners, and the members of the fire department could be parceled out and stationed in private buildings, so that practically the whole expense of the fire department would be paid by individuals or corporations. If the city has authority to do that it could accomplish the same result with policemen, who are in the direct exercise of the police power, and they might be stationed in every building where disorder or violation of the law might occur and the expense be charged to the owner."

Reasoning along these lines, and following the settled law, I believe it settles the proposition that Chief Stewart was merely discharging his duty as a chief in stationing these policemen at these crossings, and that the city cannot impose any tax upon the railroad companies for such duty, as the *City of Chicago v. Weber* well settles. The powers of the city to compel private individuals to employ and pay policemen to be present at these crossings is not given, nor is it essential to the declared objects and purposes of the municipal corporation.

Therefore, inasmuch as the city had no contract of any kind for the payment of these policemen stationed at these railroad crossings, and because the chief merely performed his official duty in so stationing the said policemen, I must submit that the city certainly cannot enforce payment for the services of said policemen.

Very truly yours,

HARRY J. GANEY,

Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,

Corporation Counsel.

MAY 25th, 1911.

BOWES REALTY Co., F. M. Bowes, Esq., City.

Dear Sir:

You say in your favor of the 22nd inst., relating to the above matter: "The question is asked, whether or not the street (paved road-way when paved) will be made uniform in width, and if so whether the adjoining owners in this block between Ontario and Ohio Streets would get the benefit of the fourteen feet, giving seven feet on each side, and in that event would the city receive compensation, and also what would be necessary to bring this about."

Taking up your question categorically, my answer is as follows:

Having the power to vacate streets the City Council may in the exercise of a sound official discretion, conclude that a portion of the street, either in length or in width, is not nec-

essary for public use and convenience, and vacate the same by passing an appropriate ordinance as required by law. Where, as in this case, the proposed vacation will secure uniformity of street lines with the remainder of the street, the validity of such ordinance cannot be questioned, the law being that property owners purchase and hold subject to the city's power to contract or widen the streets.

Assuming that the street in question was dedicated either by statutory plat or according to the common law, I would say that in either case the abutting property owners will get the benefit of the vacation. If the dedication was made in conformity with the statute, the title to the land vacated will revert to the original dedicator, subject to the right of abutting property owners to ingress and egress by way of the street, while in case of a common law dedication, the fee title itself reverts to the abutting owners.

In neither case is the city entitled to compensation from the abutting owners, who in turn, cannot claim from the city damages for the act of vacation, which act if it takes place at all, will precede the improvement of said Fairbanks Court by the city.

Very truly yours,

NICHOLAS MICHELS,

Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,

Corporation Counsel.

MAY 25, 1911.

HON. CHARLES M. THOMSON, Alderman, 25th Ward.

Dear Sir:

Your letter of the 29th ult. addressed to the Corporation Counsel, in which you inquire whether the Chicago Telephone Company is justified under its ordinance in refusing to connect an unlimited service line with a private exchange switchboard installed in connection with two measured service trunk lines, has been referred to me, and in reply permit me to say:

Section 6 of the Chicago Telephone Ordinance of November 6, 1907, among other things, provides:

“Subscribers or lessees to measured service contracting for two or more single party lines at measured rates at the same premises shall be furnished, if they desire, without additional charge, private branch exchange switching apparatus, appliances and equipment, including an operator’s telephone, but a charge of one dollar and fifty cents (\$1.50) per quarter may be made for each terminal telephone connected with the private branch exchange switching apparatus upon the same premises.”

I have been unable to find any other provision of the telephone ordinance under which private exchange switchboards are furnished to subscribers. Such switchboards are not required to be furnished with the ordinary business unlimited lines at \$125.00 per year. The ordinance itself provides, however, in Section 6 thereof, for single party unlimited lines in connection with and as a part of the measured service described in said section, and fixes the rate for such lines at \$1.00 per day. Such a line will, of course, be installed and connected with the private exchange switchboard which is being used in connection with the measured service line described in your letter.

In my opinion the ordinance does not require the telephone company to connect a single party unlimited business line at \$125.00 per year with a switchboard installed and maintained in connection with measured service lines. The officers of the Chicago Telephone Company insist that the making of such connection would not only give the subscriber a class of service for which he does not pay and to which he is not entitled under the terms of the ordinance, but that it would also decrease the telephone company’s receipts from such measured service lines by reason of the fact that such unlimited service line would be used to the greatest possible extent, thus making fewer the number of calls which would otherwise be made over the measured service lines. It seems to me that the objections of the telephone Company are well taken.

Very truly yours,

CLARENCE N. BOORD,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JUNE 2, 1911.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

I have the communication of the Secretary of your committee requesting an opinion in reference to the claim of Matthew Werle for wages withheld while suspended from duty as dog-catcher in the Police Department.

The records of the Civil Service Commission show that on September 14, 1908, Matthew Werle was suspended from duty pending an investigation of charges. On October 14, 1908, he was reinstated and on the same day again suspended, and on the 14th of each month thereafter, he was reinstated and immediately suspended until January 14, 1910, a period of sixteen months, when he was again suspended and was tried before the Civil Service Commission February 4, 1910, for violation of Paragraph 4, Section 2, Rule 36, of the Police Department, viz: "Conduct unbecoming a police officer or employe of the police department." On March 28, 1910, his discharge was rescinded and he was reinstated in his position; restored to duty April 9, 1910, but did not commence to draw any salary until about a month later.

I am informed by the officials of the Police Department that it has been the custom of the department to select employes of the dog-pound (certain persons who from experience have proven their ability and fitness as dog-catchers), and invest them with a uniform and star. They are then placed upon the dog-catcher wagon. The reason, I am told, for thus equipping a dog-catcher is so that he may not be attacked while performing the duties of his position as frequently happened when the dog-catcher was without uniform and star.

Werle, so far as the record before me discloses, was never at any time appointed a police patrolman of the City of Chicago after a civil service examination for that position and subsequent certification to the head of the Police Department; neither does the record show that he has ever been appointed to the position of police patrolman by the Mayor of the City of Chicago. The appropriation ordinances passed since September 14, 1908, make provision under the head of "dog-pound" for certain numbers of dog-catchers at a salary of

\$100.00 a month. There is nothing in these facts, which, in my opinion, would constitute Werle a constitutional or municipal officer.

In *People v. McCann*, 247 Ill., page 130, it is said :

“The power to appoint persons to fill offices established by ordinance is vested by the statute in the mayor with the approval of the city council and could not lawfully be delegated to another officer. (*Bullis v. City of Chicago*, 235 Ill. 472.) The city council may, by ordinance, create offices, but they must be filled by the authority and in the manner prescribed by the statute. (*Moon v. Mayor*, 214 Ill. 40.) It follows that, as plaintiff in error was never elected inspector of police and was never appointed to said office in any manner authorized by law, he never was, in fact, a *de jure* officer. * * * If plaintiff in error was seeking to establish his title, or some right depending upon a valid title, to the office of police inspector, he would be required to show that he is a *de jure* officer. (*Stott v. City of Chicago*, 205 Ill. 281; *McNeill v. City of Chicago*, 212 *id.* 481; *Bullis v. City of Chicago*, *supra*; *Moon v. Mayor*, *supra*.)”

It may be admitted that the rule of law is that where an officer *de jure* is illegally deposed from his office, the salary attached to the office, being an incident to the title to that office, necessarily follows the title and that the illegally removed officer can regain his salary upon a determination that his removal is illegal and this is true whether he has performed other work during the interim during which he has been suspended or has had an opportunity to perform such work.

This rule, however, is limited to *de jure* officers and as Werle was not appointed to the position of police patrolman in the manner pointed out by the civil service law, he was not, at the time of his suspension, discharge or reinstatement, a *de jure* officer as police patrolman.

There is no provision made in the statutes for the office of dog-catcher; consequently, it cannot be said that he is either a state or constitutional officer, and the office of dog-catcher was unknown to the common law. It exists, therefore, only when created by the statute or by municipal ordinance adopted by authority of the statute.

To be a municipal officer, as pointed out in the *McCann*

case, he must be appointed by the mayor with the approval of the city council, which, in the present instance, does not appear to have been done. It is true, there is an appropriation for dog-catchers for several years last past. The appropriation ordinance does not create the office. It is said in *Moon v. Mayor*, 214 Ill., page 44:

“nor can an office be legally established by the appropriation of the public money, by ordinance, to the payment of the salary or compensation of the person acting as an officer.”

Consequently, it is not clear in the present case that there has been any such office as dog-catcher created, nor has the claimant here been appointed legally to fill any such office. It follows, therefore, that Werle is merely a municipal employe or holder of a place of employment in the City.

I do not think it can be said, as a matter of law, that a mere municipal employe during a period of suspension which is finally ended by reinstatement is entitled to the salary of his position during the time of his suspension, even conceding that such suspension was illegal, which I am not prepared to admit in the present case, and in any event, were Werle entitled to his salary during the suspension, the City would have the right to set off against this amount any sums which Werle earned or could have earned during the time of his suspension.

The petition of Werle, attached to the documents transmitted to me, shows that he “believes the City of Chicago is indebted to him for his pay during the entire time of his suspension and prays your Honorable Body to take such steps as may be necessary to insure his payment.” This demand I do not consider to be well founded in point of law for the reasons above stated.

Yours respectfully,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

MACLAY HOYNE,
Acting Corporation Counsel.

JUNE 5, 1911.

HON. MURDOCH CAMPBELL, Commissioner of Buildings.

Dear Sir:

I have before me a letter dated May 24, 1911, addressed to Chief of Police McWeeny and signed by E. E. Vail and S. Hornstrom, wherein they state that there is being erected a tent at the northwest corner of Wilson and Clarendon avenues and requesting the Police Department to take steps to remove the said tent and other equipment. This communication has been referred to you.

I also have before me your communication dated May 29th, to which the letter addressed to Chief McWeeny is attached, wherein you desire an opinion as to whether the business of selling ice cream and refreshments should not be included in the uses of buildings of Class I under the ordinance regardless of the fact that the structure containing the business is a tent; and if it can be included in Class I, you desire to know whether you can require the provisions of the ordinance for buildings of Class I to be complied with as to the premises in question.

I understand that the tent in question covers about 55 x 75 feet of ground and is constructed in the manner in which tents are ordinarily constructed. I understand further that the owner of this tent which is now being used as an ice cream parlor has improved this place by having a wooden floor placed on the ground and that this ice cream parlor contains the usual and ordinary equipments, such as tables, chairs and ice cream fountain, and ordinary utensils connected therewith, and a ten-foot counter. I further understand that no permit has been taken out from your department for the erection of this tent.

The question that your department would naturally be interested in is whether a person can operate a business in a tent, which would ordinarily come under Class I of buildings and which would require a certain kind of construction, and thus evade the necessity of complying with all the provisions of the ordinance relating to Class I of buildings because the business operated is in a tent.

Article III of the chapter on Buildings, Section 240 of the

new Code, the title of the article being, "Classification of Buildings", reads as follows:

"240. BUILDINGS—CLASS OF.) (a) All buildings other than sheds and shelter sheds as hereafter described now existing or hereafter erected, altered or enlarged shall be classified as follows:

(b) CLASS I.) In Class I shall be included every building other than department stores as described in this chapter, used for the sale, storage or manufacture of merchandise and every stable or garage having a ground area of 500 square feet or over."

The question for this department, as I understand it, is as to whether a tent can be construed as a building for the uses and purposes of Article III, "Classification of Buildings", although the word "tent" is nowhere used in the entire chapter on Buildings.

The Century Dictionary defines "building" to be:

"A structure in the nature of a house built where it is to stand; as commonly understood, a house for residence, business or public use or for shelter for animals or storage of goods."

Webster's Unabridged Dictionary defines "building" as:

"A fabric or edifice constructed for use or convenience as a house, a church, a shop."

In neither of these definitions, does it seem to be material as to what the material is which covers the structure.

The case of *Blakemore v. Stanley, et al.*, a Massachusetts case, reported in the 33 N. E. 689, deals with the subject as to whether a tent may be construed as a building. In this case, a bill was filed by William Blakemore against Joshua Stanley and others, to compel the removal of a tent and stables from certain lots and to enjoin the defendants from maintaining them thereon. The bill alleged that the plaintiff had conveyed certain lots to defendant by deed providing that "for ten years from January 1, 1889, no buildings shall be erected other than dwellings * * *, said dwellings to cost not less than \$2,000.00 each * * *." The bill further alleges that the defendants, in violation of this clause, placed a stable and tent costing less than \$2,000.00. In this case the court found that the tent was about 10 x 12 feet square and had been used to live in but not to sleep in, it being filled up with a

cook stove and other furniture; that said tent was placed on said lots temporarily, the defendants living in their own home in Summerville in winter. The court said in its opinion:

“Is then a tent, such as is described in the report and used in the manner therein set forth, a building? The ordinary meaning of the word ‘building’ is said by Mr. Justice Norton in *Noel v. Boston Academy of Notre Dame*, 130 Mass. 209, to be a structure or edifice enclosing a place within its walls and usually covered with a roof.
* * *

In this case, the court held that the tent as above described was a building and finding that the tent was in violation of the terms of the restriction and that the plaintiff was entitled to a decree directing the removal of the tent and stable and restraining the defendants from using the lots in the manner in which they had been using them.

In the case of *Quiesdell v. Gay*, 79 Mass. 313, the court was called upon to decide as to whether a wall built around three sides of a stack of an iron furnace at a distance of a few feet from it was a building. In this case the court held that it was not but gives this definition of a building:

“In its broadest sense, it can only mean an erection intended for use and occupation as a habitation or for some purpose of trade, manufacture, ornament or use constituting a fabric or edifice, such as a house, a store, a church, a shed.”

I believe that there is nothing in the foregoing definitions of buildings which would exclude a tent. On the contrary, it appears from the foregoing that it is immaterial whether the covering be made of wood, stone, glass, paper or cloth.

I am, therefore, of the opinion that a tent used as an ice cream parlor in its ordinary acceptation would come under Class I of buildings and would have to comply with all the regulations pertaining to this class, and that your department has the power to enforce all the provisions of the ordinance pertaining to Class I of buildings upon the tent in question.

Yours respectfully,

MAX M. KORSHAK,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JUNE 5, 1911.

MR. WILLIAM CARROLL, City Electrician, Chicago.

Dear Sir:

We beg to acknowledge your communication of May 26, 1911, asking if the territory known as the Village of Edison Park is now a part of the City of Chicago and subject to the ordinances and rules of your department, etc., also asking if it is the duty of the city officials to light the streets in that territory and if so from what date you should commence paying the bills for street lighting.

At an election held Nov. 8, 1910, the people of the Village of Edison Park and of the City of Chicago by virtue of an expression of the public will as evidenced by the vote cast on that date, annexed said village to the City of Chicago, and this department took the position that the jurisdiction of the city extended over that territory by operation of the statute relating to annexation, the moment the votes that were cast on Nov. 8th were canvassed and the results determined, and ever since that time the territory formerly known as the Village of Edison Park has been a part of and under the jurisdiction of the City of Chicago and subject to its ordinances as well as the rules of your department governing the installation and maintenance of apparatus, etc.

Section 4 of the Annexation Act of April 25, 1889, provided that:

“The City, village or incorporated town to which the whole of another city, village or incorporated town is annexed under the provisions of this act shall assume, and pay any and all debts, liabilities, bonds or obligations and interests thereon of the city, incorporated town or village so annexed and shall become vested with title and ownership of all property belonging to said city, village or incorporated town so annexed to be held for the same purpose and for the same use.”

By Section 4 just quoted the City of Chicago on Nov. 8, 1910, became vested with title and ownership of all property belonging to the Village of Edison Park which includes street lamps, as well as other property, and it is the duty of the City of Chicago alone to light the streets of that territory and pay the bills therefor since Nov. 8th, the date of the annexation,

provided, however, that no part thereof was paid by the Village of Edison Park. Also under the same section the City shall assume and pay all debts, liabilities, etc., of the village so annexed, and if there was any unpaid bill for street lighting at the time of the annexation of Edison Park, the City of Chicago is liable therefor.

It might be well, however, to investigate for the purpose of ascertaining if the village of Edison Park had in force at the date of the annexation any contract or agreement of any nature for the lighting of its streets. If so, it may become our duty to respect such a contract.

Yours respectfully,

P. W. SULLIVAN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JUNE 6, 1911.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

The following proposition has been submitted to me for answer:

Can the present Second Assistant Superintendent of Streets and Alleys be transferred by a sixty-day appointment to the position of Superintendent of Streets and Alleys, obtaining for the purpose of filling the higher position a leave of absence and later on, when an examination is held by the Civil Service Commission for the position of Superintendent of Streets and Alleys, be eligible to take such examination?

Section 9 of the Civil Service Act provides that:

"The commission shall, by its rules, provide for promotions in such classified service, on the basis of ascertained merit and seniority in service and examination, and shall provide, in all cases where it is practicable, that vacancies shall be filled by promotion. All examinations for promotion shall be competitive among such members of the next lower rank as desire to submit themselves to such examinations; * * *"

The present incumbent of the office of Second Assistant Superintendent of Streets is at present a member of the next

lower rank to the Superintendent, and as such is now eligible to an examination for promotion to the position of Superintendent.

Rule VI, Section 1, Rules of the Commission, provides:

“Whenever a vacancy in the classified service exists, unless such vacancy is filled by reinstatement or transfer, it shall be filled by promotion from the next lower rank or grade, when such rank or grade contains two or more eligible persons desirous of taking examination. Promotion shall be accomplished by means of a competitive promotion examination. Should not more than one eligible candidate register, or should all candidates fail to pass, an original entrance examination shall be held.”

Section 2 provides:

“No person shall be eligible for promotion from a position in any grade to fill a vacancy in the next higher grade unless the position in which he is employed at the time of examination is in the same line and character of work as the position to be filled, and unless such person has served in such grade, by actual employment, for at least six months, unless otherwise prescribed by these rules, and is at the time of examination actually employed in such grade, or is on leave of absence, or is eligible for reinstatement.”

Rule IX, Section 1, provides in part:

“Leave of absence may be granted by the head of a department for a period not exceeding ninety days, and shall be reported immediately to the Commission. Upon approval by the Commission, leave may be granted for a period not exceeding one year. No leave of absence shall be granted within ninety days after appointment or reinstatement except with the consent of the Commission. Leave of absence shall not be extended unless application therefor be made prior to the expiration thereof, and any such leave, extension or continuation, whether continuous or not, shall not exceed one year. Upon the expiration of a leave of absence an absentee may be reinstated in his former position; * * * Where leave of absence is requested to enable an employe to take any position in the service of the city not included in the classified service, the same may be granted for periods of one year and during the actual service of said employe in such position.”

It thus appears that the Second Assistant Superintendent of Streets, if at the time of the promotional examination for

Superintendent of Streets is on leave of absence, according to Section 2 of Rule VI above quoted, he is eligible for such examination.

If, therefore, pending an examination for the Superintendent of Streets, the present Second Assistant Superintendent of Streets should be appointed to the first named position and should obtain a leave of absence from the second named position, as provided by the Rules of the Civil Service Commission, he would be eligible to take a promotional examination for the position which he temporarily held, namely, that of Superintendent of Streets.

Very respectfully yours,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,
Corporation Counsel.

JUNE 6, 1911.

MR. H. V. WHITE, Secretary, Committee on Finance.

Dear Sir:

Your letter of May 23rd, addressed to Hon. W. H. Sexton, Corporation Council, wherein you request that he furnish your committee an opinion as to the right of the city council to appropriate money for the preparation of an exhibit at the International Municipal Congress and Exposition to be held in Chicago, September 18th to 30th, 1911, has been referred to me.

I understand that the object of this exhibition is to inform and educate the public in general on all such matters which affect municipalities and to exhibit to the public the advancement and progress as shown in our cities of today in their various departments.

If the city has any power at all to appropriate money for this purpose, it derives this power under Article V, Section 62, Clause 2 of Hurd's Revised Statutes, Chapter on Cities, Villages and Towns. The clause is as follows:

"The city council in cities * * * shall have the following powers:

“To appropriate money for corporate purposes only.”

Is, then, the appropriation of money for the preparation of the exhibit in question a corporate purpose?

In the case of *People ex rel. v. Dupuyt*, 71 Ill. 655, the court defines “corporate purposes”:

“The true doctrine is such purposes, and such only, as are germane to the objects of the welfare of the municipality, at least such as have a legitimate *connection* with their *objects* and a manifest *relation thereto*.”

In the case of *Taylor v. Thompson*, 42 Ill., page 9, the court says:

“We proceed to consider the question whether a tax levied by the city, imposed for the purpose of raising bounties to secure volunteers in the late war can be properly called a tax for ‘corporate purposes.’ We may define this phrase to mean a tax to be expended in a manner which shall promote the general prosperity and the welfare of the municipality which levies it. * * * General results are all that can be expected and if it appear that a tax has been levied and voted with an honest purpose to promote the general well-being of the municipality and was not designed merely for the benefit of individuals or of a class, its collection should not be stayed by the courts.”

This case is followed by *Hackett v. Ottawa*, 99 Ill., page 86, and is quoted very extensively in the case of *Burr v. The City of Carbondale*, 76 Ill., page 45.

Of course, in the case last quoted, the court defines a “tax” for corporate purposes. The matter under discussion here is an “appropriation” for corporate purposes, but I believe that the essential part of the opinion relates to the defining of “corporate purposes”.

The preservation of the public health and the education of the people have always been considered public purposes of the highest character and such as to warrant the expenditure of public funds.

State v. Warden, 56 Conn. 216.

Vancouver v. Davis, 27 Ga. 354.

Allegheny, etc., v. Davis, 20 Md. 449.

“In fact,” says Abbott on Municipal Corporations,

page 1219, "It may be said that in municipalities in general, the greater portion of the funds raised for debts incurred are for these purposes."

The question then arises as to whether the Municipal Congress in question would have some bearing upon the health or education of the people in general.

The case of *City of Minneapolis v. Janney*, 86 Minn. 111, discusses the advisability and legality of appropriating money for the establishment and partial support of an industrial exposition and holds that such institutions are calculated to advance the material interests and general welfare of the people in the community in which they are held and thus far are so public in their character as to justify public aid.

In the case of *Shelby County v. Exposition Co.*, 96 Tenn. 653, the court says:

"An exposition of the resources of a county at a state centennial exhibition is a county purpose within the meaning of the constitutional provision authorizing the legislature to confer power upon counties to impose taxes for county purposes. * * * It is beyond plausible debate that such an exhibition is well calculated to advance the material interests and promote the general welfare of the people of the county making it. It will excite industry, thrift, development and worthy emulation in different avenues of commerce, agriculture, manufacture, art and education within the county, thereby tending to the permanent betterment and prosperity of her whole people. In short, it will encourage progress and progress will insure increased intelligence, wealth and happiness for the people, individually and collectively. Undoubtedly, that which promotes such an object and facilitates such a result in any county is to a county a county purpose in its truest sense."

Of course, this opinion discusses county purposes, but I believe that what is said above in reference to "county" purposes also refers to "corporate" purposes.

The only case I can find in the law books as holding that the appropriating of money for an exposition by a city is a corporate purpose is the case of *Morton et al. v. City of Philadelphia*, 4 Pa. Dist. R. 523. In this case the right of the city to appropriate money to defray the expenses of the transportation of the liberty bell and the expense of a committee

which was to accompany same from Philadelphia to Atlanta, Georgia, where the bell was to be placed on exhibition, was questioned as not being within the corporate powers of the city to make the appropriation in question. In this case, the people of the City of Philadelphia would derive no educational benefit and yet the court says:

"I am clearly of the opinion * * * that the appropriation to pay the expenses of the transfer and the committee is also lawful and obnoxious to no well-founded legal objections whatever."

The case of *Washingtonian Home of Chicago v. City of Chicago*, 157 Ill., page 414, has often been quoted in this office as denying the right of the City of Chicago to make appropriations in matters which, at first blush, might be considered similar to the case in question. In this case a statute provided that the city should pay over to the Home certain sums of money out of its taxation fund and that the Home should take care of and treat drunkards and intoxicated persons committed by the city authorities to such Home. The court said that the constitution of Illinois (Second Separate Section), was applicable, which is as follows:

"That no county, city, town, township or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation or make *donation* to or lend its credit in aid of such corporation."

But this case is easily distinguishable from the case under consideration in this opinion. In the *Washingtonian Home* case, the court did not decide that it was illegal for the city to pay over to the Home certain sums of money because the treatment and care of drunkards and intoxicated persons was not a corporate power, but because the *Washingtonian Home* was a corporation and that the payment by the city was a *donation to a corporation* and in violation of the section last above quoted.

I do not understand that a *donation* is requested in the Municipal Congress. I am informed that civic bodies from various parts of the country will prepare their exhibitions at their own expense and that the City of Chicago has been invited to prepare an exhibition of its own. I believe, there-

fore, that the appropriation of money for the preparation of an exhibit would not be a donation in any sense of the word.

I am, therefore, of the opinion that the City of Chicago can lawfully appropriate money for the preparation of its exhibit at the International Municipal Congress and Exposition to be held in Chicago September 18th to 30th, 1911.

Very respectfully yours,

MAX M. KORSHAK,

Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,

Corporation Counsel.

JUNE 9, 1911.

HON. H. B. WHITE, Secretary Committee on Finance, City of Chicago.

Dear Sir:

Your communication of May 26, 1911, addressed to the Corporation Counsel, relative to the legality of a claim made by the Western Union Telegraph Company for the refund of a deposit in the sum of \$2,000.00 made with the City of Chicago on or about the 22nd day of May, A. D. 1890, has been referred to me for reply.

It appears that on May 6, 1890, Mr. F. H. Tubbs while Superintendent of the Western Union Telegraph Company, requested a permit from the Commissioner of Public Works to open Canal Street from the North side of Kinzie Street to the North side of 16th Street for the purpose of laying a conduit. As a condition precedent to the issuing of said permit the City required the Western Union Telegraph Company to deposit with it the sum of \$2,000.00 to guarantee the replacement of the pavement in a satisfactory condition. It is alleged the work of laying the conduit was completed and the pavement of the street replaced in July, 1890, and that through an oversight the deposit was not withdrawn upon the completion of the work. Accordingly the Western Union Telegraph Company now demands a return of the money because of this alleged oversight.

A thorough search of the records in the offices of the

Commissioner of Public Works and of the Comptroller has been productive of nothing which throws any light upon the justice of this claim.

It appears, however, that in 1894, the Commissioner of Public Works used all of the funds at his disposal to repair the streets throughout the City, but whether he used this particular fund can not be determined because of the absence of any record thereof. Even allowing that the Commissioner of Public Works did use this money, in my opinion the City is not liable at this late date for its return.

The question is, whether a dormant claim may be revised by a demand after twenty-one years, during the whole, or nearly the whole, of which time a demand might have been made, but was not, and no reason is assigned for the omission.

Generally where a debt is payable in money and on demand the Statute of Limitations begins to run immediately after the debt is contracted; but if a demand previous to the commencement of an action is necessary, the Statute will not begin to run until a demand is made. But in the latter case there must be some limitation to the right of making a demand. A party must not be permitted to sleep over his rights to the prejudice of the party on whom he makes a claim and *who by the delay may be deprived of the evidence and means of effectually defending himself*. A demand must be made within a reasonable time; otherwise the claim is considered stale and no relief will be granted in a court of equity.

Codman Ex. etc. v. Rogers, Admx., 10 Pick (Mass.) 119.

Wright v. Paine, Admr., 62 Ala. 340.

Investigation of this claim shows that the present demand is the only one that has ever been made upon the City of Chicago for the return of this deposit; that no cause for delay in making a demand has been shown and that any evidence that the City of Chicago might have had in defense of the alleged claim is not now available.

In my opinion it is almost incredible that the Western Union Telegraph Company should have permitted such a sum to remain so long in the hands of the City of Chicago without an effort to obtain it or an inquiry as to its safety, especially when there is an absence of any fact indicating any

peculiar relation between them, inviting confidence and the indifference, or security which it may beget.

To allow this claim would be to establish a dangerous precedent because it would open the door for the introduction of claims which have lain dormant for many years. In this case the claimant by its own showing is chargeable with great laches.

I am of the opinion that the claim is barred by the Statute of Limitations and that therefore it should not be allowed.

Respectfully,

EDWARD T. WADE,
Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,
Corporation Counsel.

JUNE 9th, 1911.

HON. MURDOCH CAMPBELL, Commissioner of Buildings.

Dear Sir:

We have your letter of the 7th inst. in which you ask our advice on certain matters.

You begin this letter by asking us to favor you with an opinion as to the interpretation of the ordinance relative to the location of open air theaters in the City. We are not aware of any ordinance dealing with the question of the location of open air theaters in this city. The fourteenth class of amusements, as classified in the amusement ordinance in the new Municipal Code, would seem to include the class of amusement referred to in your letter.

We gather, however, from the remaining part of your letter that the question as to which you desire us to advise you is this: Under which of the classes of buildings into which buildings are divided by the new building code passed in last December, does the building proposed to be erected in the present case come?

Answering this question, we may note in the first place that the part of the proposed amusement park in which the people are to be seated does not seem to be a building at all. The spectators are to sit in the open air, with an arrangement

for covering them over with a canopy when it rains, which canopy will not come on the sides, at any part, nearer to the ground than eight (8) feet. The only part of the proposed arrangement which will be a building is the proposed building which will comprise the stage, the rooms used in immediate connection with the stage, and the dressing rooms.

Keeping this in mind we should say that, if the building in question belongs to any class at all of the specific classes into which buildings are divided by the new building code, it belongs to Class IVc. As to this class it is provided (page 2091 of the new ordinance) that:

“In Class IVc shall be included every building hereafter erected used for moving picture and vaudeville shows and similar entertainments, where an admission fee is charged and regular performances are given, and where the seating capacity does not exceed three hundred.”

It is true that this class only includes buildings, the seating capacity of which does not exceed 300; and it is also true that the seating capacity of the proposed place of amusement is to be 1,200. But the restriction as to seating capacity in the ordinance evidently refers to seating capacity of *the building*, and here the building has no seating capacity at all.

However, we are of the opinion, that the Building Commissioner may safely treat this proposed building as belonging to Class VIIIq, as to which it is provided that:

“Requirements with regard to buildings not within any of the above classes shall be determined by the Commissioner of Buildings, subject to arbitration,” etc.

This will leave to the Building Commissioner a wide discretion as to what requirements he may see fit to make with regard to this building and the accompanying seating capacity.

We concur with Mr. Dierssen in advising the Building Commissioner that it will be well for him to insist that the requirements with regard to seating arrangements, width of aisles, exits, installation of picture machine booths, stage and dressing rooms, etc., usually made with regard to entertainments of a similar character carried on wholly within buildings, be complied with in this case.

Trusting that this opinion will enable you to deal with the difficulty which you have in mind, we are

Very respectfully yours,

WILLIAM DILLON,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JUNE 10, 1911.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

This department has had under consideration for some time the question as to whether you should issue an estimate to the Noel Construction Company of the City of Baltimore for two-thirds of the amount now held in reserve by the city under its contract with this Company for the general work on the City Hall building.

On April 17, 1911, the City Council passed an order by 55 yeas to 2 nays (over two-thirds of the aldermen elected), "authorizing" you to issue such estimate (Council Proceedings, page 4485). Mayor Busse signed this order also on April 17, 1911. By this order the City Comptroller is "authorized to issue warrants in payment of said estimate upon the presentation of evidence satisfactory to him that all sub-contractors of said Noel Construction Company * * * have received * * * amounts bearing the same proportion to the total value of all labor and materials furnished by them under said sub-contracts to the satisfaction of Messrs. Holabird & Roche, architects, and of the Commissioner of Public Works, as the amount received by said Noel Construction Company, including the payment herein authorized, bears to the total value of all labor and materials furnished by it to the satisfaction of said architects and of said Commissioner." The order contains a proviso that the sureties upon the bond given by the Noel Company for the performance of its contract shall consent in writing to the payment authorized by the order.

It appears from the report of the Committee on City Hall

(Council Proceedings 1908-09, p. 1925) of November 30, 1908, that bids for the construction of the New City Hall were submitted to the Commissioner of Public Works and considered by said Committee (apparently in conformity with the provisions of the City Code).

Under the provisions of the contract certificates were to be issued semi-monthly by the architects to the Noel Construction Company for eighty-five per cent. of the work done and materials properly set in place, and on or about the 5th and 20th days of each month, upon the approval of such certificates by the Commissioner of Public Works, the latter was to issue estimates for the amount of the certificates, subject to such additions or deductions as the contract provided for. These estimates so issued entitled the holder to receive the money due thereon, when money applicable to the payment of such work should be available.

The remaining fifteen per cent. of the value of the work done and materials set in place, from time to time, as these architects' certificates were issued, was to be retained by the city under Paragraph 14 of the contract "*as part security for the faithful performance of this contract, and shall not be paid until the expiration of thirty days after the completion of said work, acceptance of the same by the Commissioner of Public Works and the architects, payment of all claims for labor and materials, and the return of all plans, specifications and drawings to the architects. The giving of the aforesaid certificates and estimates, however, shall in no way lessen the total and final responsibility of the party of the first part.*"

The work under this contract was to be completed within *eighteen months* from the date of delivering possession of the premises to the Company. This time expired *October 15, 1910*. The contract contains provisions for extensions of time in case of delay *not due to the fault of the Company*, and it is claimed by the Company and its counsel that the delays of this character were so numerous as to make it impossible to complete the work within the eighteen months specified, although the Company made unusual progress considering the delays. It is claimed by the Noel Company that proper notices relat-

ing to such delays were given to the architects and Commissioner of Public Works from time to time within the said period of eighteen months, and that within that time the Company filed with the Commissioner of Public Works a claim or request for time extension, setting forth in detail the various matters which it claimed caused the delays, giving dates, etc.

In your communication of the 8th ult, you state that at the present time you are unable to determine the amount of probable loss due to delays which prevented the city from moving into the New City Hall, including the obligation imposed thereby on the city for rentals of buildings at 200-4 Randolph street, 78-82 La Salle street, 117 Market street and the Galbraith building on or near Madison street. You further state that you have been unable to procure from Holabird & Roche, the architects, a statement as to the cause of delays by the Noel Company, which prevented the Company from completing its contract on October 15, 1910, but that "the accumulated damages on account of delay amounted to \$94,400.00". You add that there is a controversy between the Noel Company and its sub-contractors as to the amount of money due from the former to the latter, of which the latter has complained.

The work to be done under this contract, I am informed, is now substantially but not entirely completed, because the work can not be finished until the marble work on the building is done. I understand the marble work is being done under a separate contract made directly with the city, with which the Noel Construction Company has nothing to do and over which it has no control. It seems likely that it will be some months before the marble work is completed. The contract which the city made for the *marble work* did not require the completion of that work until *October 15, 1910*, which was the very date of the expiration of the eighteen months given to the Noel Construction Company to finish its work. The Noel Company claims that it was impossible for it to finish all of its work under the contract until *after the marble work had been completed*.

I understand the city now has in its possession as a reserve, withheld up to the first of last March, \$488,624.65, rep-

representing work done and materials furnished by the Noel Company, upon which the architects have passed and for which estimates and certificates have been issued. On March 1 last the value of the work remaining to be done by the Noel Company was estimated by the architects at \$87,547.10. In a letter of March 30, 1911, addressed to B. J. Mullaney, the former Commissioner of Public Works, Holabird & Roche, the architects, state, with the approval of John M. Ewen, the consulting engineer, (Council Proceedings April 5, 1911, pages 4572-4), that the value of this remaining work was reduced, between March 1 and the date of their letter, to \$70,000.00, so that the city now has in its hands the said sum of \$448,624.65 plus the money with which to pay the eighty-five per cent. on the unfinished work as it shall be finished from time to time, and plus the fifteen per cent. reserve withheld by it on its unfinished work. It should be observed, also, that for its protection the city has a bond in the sum of \$1,100,000.00.

The order passed by the City Council April 17, 1911, contemplating the payment of two-thirds of the reserve which was on hand March 1, 1911, calls, then, for a payment of \$325,749.00. If this sum should be paid pursuant to said order, the city will still have on hand the full amount of money to cover the unfinished portion of the work, plus \$162,875.65, balance of the reserve withheld by it up to March 1 last, and the bond just referred to.

Former Commissioner of Public Works Mullaney, in his letter of March 30, 1911, concurred (Council Proceedings April 5, 1911, page 4371) in the recommendation of Holabird & Roche contained in their communication of the same date.

On this statement of facts the following questions arise:

First: In general, has a Common Council or City Council authority to act through orders or resolutions, and has the city Council of the City of Chicago such power?

Second: Can matters like the subject matter of the order of April 17, 1911, be embraced lawfully in an order or resolution, or must they be embodied in an ordinance, using the term "ordinance" in its narrow and special significance as distinguished from a resolution? Is the subject matter of the order in question of a permanent or temporary character?

Third: Is this order a mere expression of opinion on the part of the City Council, and can it be said that all orders or resolutions under the Cities & Villages Act are of such nature?

Fourth: Had the City Council the power, by the order of April 17, 1911, which was passed by a yea and nay vote, signed by the Mayor and published as all ordinances are published, to change the terms of the contract of December 8, 1908, with the Noel Company, although the making of said contract on the part of the city was originally authorized by an ordinance passed with due regard to the forms prescribed in the statute?

This Fourth question involves the further questions:

(a) Could the City Council have legally authorized the making of the contract of December 8, 1908, by order or resolution instead of by ordinance? Is the making or amending of a city contract, or action directing the payment of money thereunder, an administrative or ministerial act, or is it an act, which prescribes a continuing or permanent rule of conduct, and therefore legislative in its character?

(b) Does the order under consideration merely authorize a change in the terms of a written contract, or does it amount to an attempted amendment of the ordinance of December 7, 1908, authorizing the contract with the Noel Company, such amendment being unlawful?

Fifth: If it be true that the subject matter of the so-called order of April 17, 1911, should have been embodied in an ordinance, is not said order, whatever its form or style, an ordinance within all the statutory requirements, which therefore furnishes legal authority for the payment thereby directed?

(a) What, if any, was the effect of the approval of said order by the Mayor?

Sixth: Is the order of April 17, 1911, mandatory as to the Comptroller and Commissioner of Public Works, or does the use of the word "authorized" imply a discretion lodged in each of them as to whether they will or will not exercise the "powers" given by the order?

I shall consider these questions in their numerical order:

First: In general, has a Common Council or City Council

authority to act through orders or resolutions, and has the City Council of the City of Chicago such power?

The law is settled that "where the charter of a municipality is silent as to the mode in which the City Council *shall perform an act*, the "*decision*" of the Council may be evidenced by either a resolution or an ordinance."

C. & N. P. R. R. Co. v. City of Chicago, 174 Ill. 439, 445.

Board of Education v. DeKay, 148 U. S. 591, 598.

Nazworthy v. City of Sullivan, 55 Ill. App. 48, 51.

Mackin v. City of Chicago, 93 Ill. 105, 110.

Agnew et al. v. Brall, 124 Ill. 312, 314.

City of Quincy v. C. B. & Q. R. R. Co., 92 Ill. 21, 24.

City of Crawfordsville v. Braden, 130 Ind. 149.

Illinois Trust & Savings Bank v. Arkansas City, 76 Fed. 271, 286.

City of Green Bay v. Brauns et al., 50 Wis. 204.

Merchants' U. B. W. Co. v. C. B. & Q. R. R. Co., 7 Ia. 105, 108.

Elliott on Municipal Corporations, Sec. 193.

City of Burlington v. Dennison, 42 N. J. L. 165.

The recent decisions are also to the effect that in the absence of any statutory provision on the subject, a City Council may act by *either ordinance, order or resolution*.

Nelson v. South Omaha, 84 Neb. 434.

Grant v. Haworth (N. J. L.), 73 Atl. 241.

Steenerson v. Fontaine (Minn.), 119 N. W. 400.

The board of directors of a private corporation has the power to act through orders and resolutions even in the absence of express statutory authority.

It seems to be clear, upon the principle of the above decisions, that in the absence of an express provision requiring that *legislation* be embodied in ordinances, a City Council may even legislate by orders or resolutions. The Cities and Villages Act is but declaratory of the common law on this subject.

It is provided by Sec. II of Art. I of that act that:

"All ordinances, *resolutions* and by-laws in force in any city or town when it shall organize under this act

shall *continue* in full force and effect *until* repealed or amended."

Here is a recognition of the inherent power of a public (or private) corporation, to adopt resolutions, and an indication of an intention that the power shall reside in municipal corporations organized under the act, because the section reads that resolutions shall *continue* in force until repealed or amended, and does not provide that they must be repealed or amended by *ordinance*.

Sec. 13 of Art. III requires the taking of yeas and nays not only on the passage "of *all* ordinances," but "on all *propositions* to create any liability against the city, or for the expenditure or appropriation of its money," etc.

This language discloses no intention to limit the City Council to the right to act by ordinance only. The words "*all ordinances*" are broad enough to include resolutions and orders, or if the word "*ordinances*" is used in its narrow or restricted sense as distinguished from resolutions or orders, still the General Assembly employed the additional words "*all propositions*", which are broad enough to include resolutions, orders and motions.

Sec. 3 of Art. V of the same Act relating to the adoption of ordinances which impose fines, etc., or make appropriations, concludes: "And all *other* ordinances, *orders and resolutions* shall take effect from and after their passage, unless otherwise provided therein."

I conclude the first question must be answered in the affirmative.

Second: Can matters like the subject matter of this order be embraced lawfully in an order or resolution, or must they be embodied in an ordinance, using the term "*ordinance*" in its narrow and special significance as distinguished from a resolution? Is the subject matter of the order in question of a permanent or a temporary character?

In *C. & N. P. R. R. Co. v. City of Chicago*, 174 Ill. 439, 443, it was said that there is an essential difference between an ordinance of the City Council and an order or resolution passed by the same body. On the other hand, it was said in *Kepner v. Commonwealth*, 40 Pa. St. 124, 130, that "a reso-

lution is only a less solemn or less usual form of an ordinance. It is an ordinance still if it is anything intended to regulate any of the affairs of the corporation."

What, then, is the *essential difference* between an ordinance and an order or resolution? In *C. & N. P. R. R. Co. v. City of Chicago*, 174 Ill. 439, 443-45, it was said:

"An ordinance prescribes a *permanent rule of conduct or government*, while a *resolution* is of a *special or temporary* character. Acts of legislation by a municipal corporation, which are to have continuing force and effect, must be embodied in ordinances, while mere *ministerial* acts may be in the form of *resolutions*."

See, also:

People v. Mount, 186 Ill. 560, 571, 574-5.

Village of Altamont v. B. & O. S. W. Ry. Co., 184 Ill. 47, 51.

Nazworthy v. City of Sullivan, 55 Ill. App. 48, 51.

City of Paxton v. Bogardus, 201 Ill. 628, 640.

17 Am. & Eng. Ency. of Law (1st Ed.), p. 235.

Abbott on Municipal Corporations, Vol. 2, p. 1304.

In the Northern Pacific Case the court decided that fixing the grades of streets was a legislative act and should be done by ordinance.

In *Village of Altamont v. B. & O. S. W. Ry. Co.*, 184 Ill. 47, 51, the court said:

"Acts of legislation by a municipal corporation, which establish a permanent rule of conduct or government and which are to have continuing force and effect, must be established by ordinance."

In that case the village undertook to exercise the police power delegated to it by statute and require a flagman to be kept at a railroad crossing, by the passing of a simple motion and service of notice. Plainly, the village there sought to establish a permanent rule of conduct, and not the performance of an administrative or ministerial act.

See also:

City of Paxton v. Bogardus, 201 Ill. 628, 640.

People v. Mount, 186 Ill. 560, 576-77, decided that the spirit and tenor of all the paragraphs of Sec. 1 of Art. V of the Cities and Villages Act indicate an intention that police regulations must be embodied in ordinances, and that there

are no provisions in this section, or Sections 3, 4, 5, 6 or 7 of the same article, defining the powers of the City Council, which authorize the enactment of police regulations by resolution.

See also:

Village of Altamont v. B. & O. S. W. Ry. Co., 184 Ill. 47, 50-52.

In the Mount Case the question was whether a city could fix license fees for selling intoxicating liquors, by a mere resolution or motion, or whether it must be done by ordinance.

On the other hand, numerous cases uphold the validity of resolutions, the subject matter of which was of a special and temporary character and not legislative in its nature. See:

Seitzinger v. Electric Co., 187 Pa. St. 539, 542;

Kramrath v. City of Albany, 127 N. Y. 575;

Weston v. City of Syracuse, 158 N. Y. 274;

Illinois T. & S. Bank v. Arkansas City, 76 Fed. 271; 34 L. R. A. 518;

Green v. City of Cape May, 41 N. J. L. 45;

Agnew et al. v. Brall, 124 Ill. 312, 314;

Mackin v. City of Chicago, 93 Ill. 105, 110.

See also:

Egan v. City of Chicago, 5 Ill. App. 70;

Village of London Mills v. White, 208 Ill. 289, 296;

Town of New Athens v. Thomas et al., 82 Ill. 259, 261;

City of Quincy v. C. B. & Q. R. R. Co., 92 Ill. 21, 24.

“Whether an act of legislation by a municipal corporation prescribes a permanent rule of conduct or government, and whether or not it is to have a continuing force and effect, depends upon the nature of the subject matter legislated upon.”

People v. Mount, 186 Ill. 560, 571;

Kline v. Mayor, etc., 78 Ill. App. 42;

Abbott, *Municipal Corporations*, Vol. 2, p. 1304.

The order of April 17, 1911, plainly establishes no rule of government or permanent rule of conduct. It is without continuing or future effect and not designed to have general application. It applies only to the Noel Construction Company with reference to the payment of a particular sum of

money out of a particular fund for work done and materials furnished under a particular contract. The order does not seek to establish either a permanent or future guide or rule for the dealings of the city even with the Noel Company, or with reference to the new City Hall, under the contract of December 8, 1908, or any other contract. The order does not seek to *appropriate* any money from the city treasury, *impose* any liability upon the city, nor waive any rights the city may have under said contract.

I conclude, then, that the order of April 17, 1911, is special and temporary in its character, and therefore, so far as this immediate question is concerned, valid. The subject matter of the order is such that it was properly embodied in the resolution or order, and the adoption of an ordinance styled as required by Sec. 2 of Art. V of the Cities and Villages Act was unnecessary.

Third: Is this order a mere expression of opinion on the part of the City Council, and can it be said that all orders or resolutions under the Cities and Villages Act are of such nature?

It is true that it was said in *C. & N. P. R. R. Co. v. City of Chicago*, 174 Ill. 439, 445, that a resolution or order is not a law, but merely an expression of opinion by the City Council.

See also:

People v. Mount, 186 Ill. 560, 574;

Village of Altamont v. B. & O. S. W. Ry. Co., 184 Ill. 47, 51;

City of Paxton v. Bogardus, 201 Ill. 628, 640.

None of the decisions in the above cases turned on any such point, but upon the points just discussed under the second head. The remark is a mere dictum. It is true that the adoption of a resolution *may be* merely the expression of an opinion, but the language quoted should not be construed as indicating that all resolutions or orders are expressions of opinion and nothing more. for, as I have previously pointed out, private corporations always and municipal corporations frequently act through the medium of resolutions or orders.

Sec. 3 of Art. V of the Cities and Villages Act precludes the treatment of resolutions as mere expressions of opinion.

This section authorizes or confirms the right of the City Council to adopt orders and resolutions, and plainly authorizes that body to fix therein the *time when they shall take effect*. An *expression of opinion takes effect* the moment it is expressed. If a resolution is a mere expression of opinion, such opinion would be expressed *immediately upon the adoption* of the resolution. To interpret this section of the statute as authorizing merely the expression of an opinion by the City Council, in such manner that although the order or *resolution* should be adopted *at one time* the *opinion* expressed thereby should *not be expressed* until some day in the future, would give to this section a ridiculous construction.

I conclude, then, that *all* resolutions or orders are not mere expressions of opinion, but may be used by the City Council when taking administrative or ministerial action. That orders and resolutions may be employed by the City Council for special or temporary purposes is recognized by the very Illinois decisions from which the above quoted extract was taken.

Fourth: Had the City Council the power, by the order of April 17, 1911, which was passed by a yea and nay vote, signed by the Mayor and published as all ordinances are published, to change the terms of the contract of December 8, 1908, with the Noel Company, although the making of said contract on the part of the city was originally authorized by an ordinance passed with due regard to all the forms prescribed in the statute?

I have viewed this question as necessarily involving the determination of the authority on the part of the City Council to authorize the making of a contract by order or resolution, or to amend by resolution a contract which has been originally authorized by ordinance.

I turn at once to a consideration of the first subdivision of the fourth question:

(a) Could the City Council have legally authorized the making of the contract of December 8, 1908, by order or resolution instead of by ordinance? Is the making or amending of a city contract, or action directing the payment of money thereunder, an administrative or ministerial act, or

is it an act which prescribes a continuing or permanent rule of conduct, and therefore legislative in its character?

An examination of the authorities relating to the power of a municipal corporation to make contracts is desirable. In Cyc. Vol. 28, p. 634, it is said:

“A municipality because it is ‘a body corporate and politic’ has an *inherent power to enter into contracts* just as has a private corporation. This faculty to contract is an essential feature of its life without which it could not exercise its functions or serve the purpose of its existence.”

And also:

“A municipal charter usually contains a grant of express power to contract in regard to various subjects, many of which are embraced within the inherent capacity of a municipality, and therefore as to these it is a mere declaration of existing right.”

In *City of Galena v. Corwith*, 48 Ill. 423, 424, it was said:

“We believe it to be well settled doctrine that corporations have all the powers of ordinary persons as respects their contracts, except when they are expressly or by necessary implication restricted, and that they have all the powers necessary to carry out an expressly granted power.”

And again, in *Town of Athens v. Thomas*, 82 Ill. 259, 261, it was said that the Common Council of a municipal corporation “is the general agent of the municipality for all purposes and exercises all the corporate powers not expressly delegated by law to other boards or officers.”

See also:

Cyc., Vol. 28, p. 316.

On page 317 of the last mentioned work is also the following statement:

“Indeed, it will be found that whenever and however a power of any kind is conferred upon a municipal corporation, either by charter or general law, and no officer or body or other person is expressly clothed with such power, then such municipal function is to be exercised by the Common Council as the general agent of the municipality, just as the board of directors, the general agency of a private corporation, exercises its corporate function.”

And it is further stated upon page 643:

“Unless otherwise specially provided by law, the power to make municipal contracts resides in the counsel as the general governing body of the corporation.”

I have previously cited herein numerous authorities to the effect that where the charter of a city is silent as to the mode in which the City Council shall perform an act, it may act by either resolution or ordinance. It is well settled that where a charter conferring the power to contract does not specify the manner in which it must be exercised, the City Council in its discretion may exercise the power by ordinance, resolution, order or a motion.

City of Green Bay v. Brauns, et al., 50 Wis. 204;

Board of Education v. DeKay, 148 U. S. 591, 598;

Illinois T. & S. Bank v. Arkansas City, 78 Fed. 271, 286; 34 L. R. A. 518;

City of Crawfordsville v. Braden, 130 Ind. 149; 14 L. R. A. 268, 273;

Nazworthy v. City of Sullivan, 55 Ill. App. 48;

C. & N. P. R. R. Co. v. City of Chicago, 174 Ill. 439, 445;

Merchants' N. B. W. Co. v. C. B. & Q. R. R. Co., 7 Ia. 105;

Village of London Mills v. White, 208 Ill. 289, 296;

City of Chicago v. C. B. & Q. R. R. Co., 92 Ill. 21, 24;

Agnew et al. v. Brall, 124 Ill. 312, 314;

Mackin v. City of Chicago, 93 Ill. 105, 110.

In *Board of Education v. DeKay, supra*, it was held that the consent of a city to the issue of bonds by its Board of Education could be legally given under the Kansas statute by the adoption of a resolution, the contention being that it must be given by ordinance.

In *City of Crawfordsville v. Braden*, 130 Ind. 149, 14 L. R. A. 268, 273, the authority of a city to proceed to the purchase of an electric lighting plant under a resolution instead of an ordinance was upheld, the court saying:

“Where the city council has power to act in a given case, and its charter does not prescribe the manner of action, it may accomplish its purpose by resolution as well as by ordinance.”

In an opinion delivered by Mr. Justice Boggs in the case of *Nazworthy v. City of Sullivan*, 55 Ill. App. 48, a resolution adopted by the City Council declaring an old building to be a nuisance, and directing its destruction, was sustained as valid upon the same principle as that laid down in the foregoing cases.

In *Klein v. Mayor and City Council of Streator*, 78 Ill. App. 42, 45, the City Council exercised its power to build a bridge and borrow money, by resolution. The court there remarked:

“There is little force and less merit in the point that the exercise of the power to build the bridge or borrow money should have been in the form of an ordinance instead of a mere resolution of the city council. In respect to the effectiveness of either form of enactment by the council, this force does not so much depend upon the form as upon the ultimate purpose to be attained.”

In *Seitzinger v. Electric Co.*, 187 Pa. 539, 642, it was decided that the passing “of a resolution” by a city council “awarding a contract * * * is not a legislative but a ministerial act in the nature of a business transaction” relating to the city’s municipal affairs, and therefore a contention that such contract was illegal because not authorized by ordinance would not be entertained. The resolution in question was not only passed by the Council but was approved by the Chief Burgess of the borough.

In *Kramrath v. City of Albany*, 127 N. Y. 575, 580, it appears that the Common Council of the City of Albany, by resolution, authorized a committee to lease quarters for a city hall and purchase furniture to fit up the same. The power of the city to perform these acts by resolution was sustained, the court saying:

“The leasing or furnishing of a room for the transaction of the city’s affairs is a mere business act, and in its power to perform it the city differs in no respect from an ordinary business corporation or an individual, and it may delegate the power to perform such acts to agents or committees.”

The power of a Common Council to modify a contract for the construction of a sewer, by the adoption of a resolution,

was sustained in *Weston v. City of Syracuse*, 158 N. Y. 274, 288, where it was said:

“A common council has many administrative duties that are not legislative in character, the performance of which at times is to be upheld by the courts. Having established by authority * * * that the resolution in question constituted a part of the administrative duties of the common council, we come next to the question,” etc.

The order of April 17, 1911, merely authorizes a part payment of the reserve retained by the city prior to the time when it would become payable under the contract of December 8, 1908. All the order does is to modify the terms of the contract in reference to the particular matter of payment of the reserve mentioned in the contract.

Where work has been done or materials furnished and the price therefor has been legally fixed or created, I take it the right of the municipality to pay the debt to its creditor before he can enforce payment according to the letter of his contract is unquestioned.

I find nothing in my search of the Cities and Villages Act requiring that cities exercise their right to contract in any particular manner.

Sec. 4 of Art. 7 of the Cities and Villages Act reads:

“No contract shall be hereafter made by the city council or board of trustees or any committee or member thereof; and no expense shall be incurred by any of the officers or departments of the corporation, whether the object of the expenditure shall have been ordered by the city council or board of trustees or not, unless *an appropriation shall have been previously made concerning such expense*, except as herein otherwise provided.”

This language does not limit the form in which the power to contract shall be exercised, although it places a qualification upon the power itself.

Sec. 2 of Art. VII of the Cities and Villages Act required that appropriations be made by an ordinance to be known as the Appropriation Bill, but this last section has no bearing on the present question. No effort is made by the order of April 17, 1911, to appropriate any money. The order deals only with the disposition of money previously appro-

riated, without attempting to divert it from the original purpose for which it was appropriated.

Sec. 13 of Art. III of the same act required the taking of yeas and nays upon the passage of all ordinances and all propositions to create a liability against the city for the expenditure or appropriation of its money, which shall be entered on the journal of its proceedings, and a majority of all the members elected to the City Council shall be necessary to the passage of such ordinance or proposition. I think the use of the word "ordinance" or "proposition" makes it apparent that liability against the city may be created and expenditures authorized in a manner other than by the adoption of ordinances. There can be no question that the particular order under consideration provides for the expenditure of city money, and makes a ye and nay vote necessary.

Sec. 50 of Art. IX of the Cities and Villages Act (Par. 116a, Hurd's Rev. Stat. 1909, p. 357), reads as follows:

"All contracts for the making of any public improvement, *to be paid for in whole or in part by a special assessment, and any work or other public improvement*, when the expense thereof shall exceed five hundred dollars, shall be let to the lowest responsible bidder, in the manner to be prescribed *by ordinance*, such contracts to be approved by the mayor or president of the board of trustees; provided, however, any such contract may be entered into by the proper officer without advertising for bids and without such approval *by a vote* of two-thirds of all the aldermen or trustees elected."

This section applies to *all* contracts for public improvements where the expense exceeds five hundred dollars and *not merely* to contracts for such improvements as are to be paid for by special assessment. The language is "clear and specific."

City of Chicago v. Hanreddy, 211 Ill. 24, 31.

Said section was not repealed by implication by the act of June 14, 1897, concerning local improvements. *City of Chicago v. Hanreddy*, 211 Ill. 24, 33.

And under the reasoning of the Hanreddy case I think it must be said that Sec. 50 was not repealed by implication by Sec. 74 of the Local Improvement Act of 1897, even after the

amendment of said Sec. 74 by the Act of May 14, 1903 (Hurd's Rev. Stat. 1909, p. 472); therefore the proviso at the end of Sec. 50 is still in full force and must be considered in determining the validity of the order of April 17, 1911. *City of Chicago v. Hanreddy*, 211 Ill. 24, 34.

Suppose this order be treated as the making of a new or original contract, still we find under this proviso the power is given to the "aldermen" as distinguished from the "city council" to make a contract of this character without advertising for bids and *without the approval of the mayor* by a vote of two-thirds of all the aldermen elected. The order was passed by such a vote. The proviso does not require that an "ordinance" be adopted by a two-thirds vote, but is silent as to the mode the aldermen shall select in authorizing the making of a contract by this vote. The proviso seems to have been designed to obviate the necessity of any ordinance when the aldermen wish to invoke its aid. I conclude an order or resolution passed by a two-thirds vote is sufficient to authorize the making of a contract under the proviso. I find no other statutory provisions dealing with the power of the City Council to make contracts for general improvements or work.

In *City of Chicago v. McKechney*, 91 Ill. App. 442, 454, in passing upon the above proviso, it was said:

"It is not required that this vote shall be in the form of an ordinance. As a proposition creating liability against the city it required a yea and nay vote, which was had."

In the McKechney case the court applies the principle so often here adverted to, that where the charter is silent as to the mode in which the City Council may act, its decision may be evidenced by either resolution or ordinance, and cites *C. & N. P. R. R. Co. v. City of Chicago*, 174 Ill. 439.

It should be noted that in the McKechney case the order which was held valid directed the payment of fifty per cent. of the amount the city was holding under a fifteen per cent. reserve clause in a contract. The points in the McKechney case we have referred to were not referred to by the Supreme Court on appeal (205 Ill. 372), but Judge Magruder seems to recognize the right of the City Council to modify a contract

without readvertisement or reletting if there was a vote in favor of the same of two-thirds of all the aldermen elected. (p. 447)

For other cases recognizing the right of the City Council to authorize the making or modification of a contract, or the payment of money, by resolution, in the absence of an express provision of the statute to the contrary, see particularly:

Ill. T. & S. Bank v. Arkansas City, 76 Fed. 271; 34 L. R. A. 518, 527;

Green v. City of Cape May, 41 N. J. L. 45;

Nicoll v. Sands, 131 N. Y. 19;

Agnew et al. v. Brall, 124 Ill. 312, 314;

Mackin v. City of Chicago, 93 Ill. 105, 110;

Town of New Athens v. Thomas, 82 Ill. 259, 261.

After an examination of the above authorities I am satisfied that the law is settled in other states that a City Council may direct the making of a contract in reference to its business affairs, such as the purchase or construction of a city hall, etc., by a resolution or order, and it is not restricted, in taking such action, to the adoption of a formal ordinance styled as specified in the statute, but in Illinois under Sec. 50 of Art IX of the Cities and Villages Act as interpreted by the Supreme Court in *City of Chicago v. Hanreddy*, and as affected by *People v. Latham*, 203 Ill. 9, 19, hereinafter referred to, I am of opinion that probably a contract for the building of a city hall or other improvement must be authorized by a formal ordinance and that an order or resolution is insufficient for that purpose *unless adopted by a two-thirds vote of all the aldermen elected*.

I am further of the opinion, especially since the city is acting in its business capacity, that an order passed by such a vote is clearly sufficient and that an ordinance is unnecessary. The use of the word "ordinance" in Sec. 50 in its formal and narrow sense conclusively implies the approval of the mayor after a vote by the *City Council* of which he is a part, while the appearance of the word "*aldermen*" in the proviso found in connection with the two-thirds vote mentioned perhaps implies that an ordinance is not requisite on such a vote because an ordinance cannot be passed by the "*aldermen*" but only by the City Council.

(b) Does the order under consideration merely authorize a change in the terms of a written contract, or does it amount to an attempted amendment of the ordinance of December 7, 1908, authorizing the contract with the Noel Company, such amendment being unlawful?

The decisions in this state lay it down as a general rule that an ordinance cannot be amended, modified or repealed by an order or resolution. *C. & N. P. R. R. Co. v. City of Chicago*, 174 Ill. 439, 445; *Hibbard & Co. v. City of Chicago*, 173 Ill. 91, 97; *City of Paxton v. Bogardus*, 201 Ill. 628, 639-40; *People v. Latham*, 203 Ill. 9, 23.

In the case last cited a resolution which provided that a contract for a local improvement, authorized previously by *an ordinance*, should not be let for all but only for a part of the work authorized by the ordinance, was declared invalid. This case does not turn on the meaning of any part of Sec. 50 of Art. IX of the Cities and Villages Act but on the interpretation of the sidewalk act of April 15, 1875 (p. 14) which the court recognizes is "independent of and distinct from" Art. IX (p. 15). The court said that inasmuch as Sec. 1 of the sidewalk act used the words "by ordinance" and not "by *an ordinance*" in providing for the construction of sidewalks the legislature in employing these words was providing for the building of sidewalks "by the *method* of ordinance" (p. 19). It does not appear in the Latham case that the resolution passed by a two-thirds vote of all the aldermen elected. It will be found generally under statutes that the authority to make local improvements to be paid for by special assessment must come from an ordinance and not from a resolution. This is true for example under Sec. 50 of Art. IX (Sec. 116a of Hurd's Revised Statutes of 1909) where it is clear the word "ordinance" is used to point out the "method" to be used by the City Council and aside from this statute the rule is settled in this state that the paving of streets and similar works done by special assessment are legislative and not special and temporary in their character and, therefore must be authorized by ordinance. *City of Paxton v. Bogardus*, 201 Ill. 628, 636, 639-40.

The order of April 17, 1911, is complete in itself and does

not in terms assume to repeal or modify an ordinance, and the effect of it is only to modify in a single particular the terms of the contract of December 8, 1908, with reference to payment. (*Wilder v. Aurora, etc. Traction Co.*, 216 Ill. 493, 520.) If the making of this contract could originally have been authorized by the City Council either by ordinance or by resolution passed by two-thirds of the aldermen elected, the fact that an ordinance was adopted for this purpose cannot affect the validity of a subsequent resolution, duly passed, directing a modification of the contract. If the city could have authorized the making of the contract of December 8, 1908, in the first instance, by resolution, it could amend the contract by resolution. The greater includes the lesser. *Town of New Athens v. Thomas*, 82 Ill. 259, 261. As has been pointed out, the immediate inquiry is, what is the subject matter to be affected. The answer must be that it is a contract dealing with the business operations of the city. The authority of the city's executive or administrative officers to make or amend the contract of December 8, 1908, could neither be increased nor lessened, whether such authority was delegated by ordinance or resolution.

The view I take of this matter is, that the order under discussion cannot be treated as invalid upon the ground it amounts to an unlawful attempt to amend an ordinance, especially when the ordinance is special and temporary in character like the order which affects it.

I answer the fourth question, therefore, in the affirmative, and hold that the City Council (or two-thirds of the aldermen elected) had the power to amend the contract of December 8, 1908, with the Noel Company, by the order of April 17, 1911, and could have authorized originally the making of the contract by such an order or resolution, and that it is immaterial that the contract was originally authorized by ordinance, styled as required by statute.

Fifth: If it be true that the subject matter of the so-called order of April 17, 1911, should have been embodied in an ordinance, is not said order, whatever its form or style, an ordinance within all the statutory requirements, which there-

fore furnishes legal authority for the payment thereby directed?

Our Supreme Court has held that an order (1) which is not passed by a majority of the members of the City Council, as required by Sec. 13 of Art. III of Part I of the Cities and Villages Act; and (2) where the yeas and nays were not taken upon its passage, as required by said section; and (3) said yeas and nays were therefore not duly entered upon the Journal of the Proceedings of the City Council, as required by said section; and (4) when such order was not presented to the Mayor for his approval, as required by Sec. 18 of said Art. III, lacks the requirements which the statute made necessary to constitute a valid ordinance, *it is a mere resolution or order*.

C. & N. P. R. R. Co. v. City of Chicago, 174 Ill. 439, 444-45;

Hibbard & Co. v. City of Chicago, 173 Ill. 91, 97.

It will be observed that the order of April 17, 1911, here under discussion meets all the requirements which were lacking in the order condemned by the above decisions, and with the sole exception that it is not styled as required by Section 2 of Art. V of the Cities and Villages Act, fulfills all the requirements laid down by the statute for an ordinance. It was passed not only by a majority but by more than two-thirds of all the aldermen elected, as required by Sec. 13 of Art. III of the Cities and Villages Act. The yeas and nays were taken upon its passage and were duly entered upon the Journal of the Proceedings of the City Council, as required by that section. The order was presented to the Mayor for his approval as required by Sec. 18 of said Art. III, and by him signed. (See *Village of London Mills v. White*, 208 Ill. 289, 296; *Wilder v. Aurora, etc. Traction Co.*, 216 Ill. 493, 520; *City of Quincy v. C. B. & Q. R. R. Co.*, 92 Ill. 21, 24.)

The order in the present case was sufficient even if it does not come within the narrow definition of the term "ordinance." The so-called ordinance authorizing the contract is not a law; not a rule of action. It has no permanency. Once acted upon it is *functus officio*. It carries no command to the public generally. It has no single element of what is generally understood to be an ordinance.

Schuttuck v. Smith, 6 N. D. 56; 69 N. W. 5, 11.

In *Steenerson v. Fountaine*, (Minn.) 119 N. W. 400, it was held that a resolution passed by a City Council with all the formalities of an ordinance, whether called a resolution or an ordinance, becomes a legislative act.

To the same effect is *Town of Tipton v. Norman*, 72 Mo. 380, where it was held that where the powers conferred upon a town are to be exercised by "ordinances" to be passed by the town council, an order or resolution adopted by the council and entered on its records, is in point of form a valid exercise of the power. See also, *State v. City Council*, 61 N. J. L. 404; *Kline v. Mayor and City Council*, 78 Ill. App. 42, 45; *Seitzinger v. Electric Co.*, 187 Pa. 539, 542.

The conclusion I have reached in passing on the first five questions leads me to the opinion that the resolution of April 17, 1911, in view of its subject matter, was properly embodied in an order, and that this order furnishes authority to the Commissioner of Public Works for the issuing of estimates as a basis for the making of payments thereon, unless the answers to the two subdivisions of the fifth question must involve its modification. (a) What, if any, was the effect of the approval of said order by the Mayor?

Sec. 1 of Art. III of the Cities and Villages Act provides that "The City Council shall consist of the Mayor and Aldermen." The language is general, and the Mayor is made a part of the City Council for all purposes. His right to participate in the proceedings of the City Council is not limited by this section to *legislative* matters or the passage of ordinances as distinguished from resolutions or orders.

"Where a charter vests the affairs of the city in the hands of the *mayor* and *councilmen*, the city council has no power except to act *in conjunction with the mayor*."

People v. Mount, 186 Ill. 560, 575; *Saxton v. Beach et al.*, 50 Mo. 488-89; *Saxton v. City*, 60 Mo. 152, 158; *Kepner v. Commonwealth*, 48 Pa. St. 124, 129; 14 Am. & Eng. Ency. of Law, p. 1032; 1 Dillon on Municipal Corporations (4th Ed.), 309, 246.

By Section 6 of Art. II it is provided that:

"The Mayor shall preside at *all* meetings of the city council, but shall not *vote* except in case of a tie, when he shall give the *casting* vote."

This section gives the Mayor power to preside at all meetings, whether they are dealing with *administrative or ministerial or legislative business* of the city, and authorizes him to give the casting vote in case of a tie, without limiting the right to vote to merely legislative matters or to ordinances as distinguished from mere *resolutions or orders*.

Sec. 18 of Art. III of the same act provides:

“All ordinances passed by the city council shall, before they take effect, be deposited in the office of the city clerk; and if the mayor approves thereof, he shall sign the same, and such as he shall not approve he shall return to the council with his objections thereto in writing,” etc.

In *People v. Mount*, 186 Ill. 560, 574, Judge Magruder quoted *Burlington v. Dennison*, 42 N. J. L. 165, and Horr & Bemis on Municipal Police Ordinances, Sec. 210, as authority for the proposition that—

“Mere resolutions do not need to be submitted to the mayor for his approval.”

The decision in the Mount case, however, did not turn on this point. It does not appear from the opinion that the resolution there under discussion was ever submitted to the Mayor for his approval. In fact, the inference from the opinion is that the Mayor and Aldermen were in conflict over a question of policy, and that the City Council, in order to avoid adverse action by the Mayor, passed a resolution instead of an ordinance fixing the amount of saloon license fees. Judge MAGRUDER stated the question involved in that case in the following language:

“The question presented for our consideration is whether the City of Joliet, whose charter is the general act providing for the incorporation of cities and villages, can fix and establish the license fees to be paid by vendors of intoxicating liquors by mere resolution or motion, or whether the power to fix and establish such license fee, when exercised, must be exercised through and by an ordinance duly enacted.”

And the court then decided that the fixing of saloon license fees was not of a temporary character but of a legislative character, as it prescribed a permanent rule of conduct or government.

In *City of Burlington v. Dennison*, 42 N. J. L., 165, it

was held that approval by the Mayor of the proceedings of the *City Council* is essential to their validity *only* by special requirement of the charter, and that under the charter of the City of Burlington the requirement of such approval was restricted to ordinances and did not include resolutions of the Council. In this case the court took occasion to discredit *Kepner v. Commonwealth*, 40 Pa. St. 124, as contrary to other adjudged cases and sustainable only by reason of the peculiar and ambiguous phraseology of the charter of the city there construed.

In the later case of *Booth v. Bayonne*, 56 N. J. L., 270, 271, where the question was presented as to the right of the Mayor to act upon a resolution, the court leans to the idea that a resolution requires the approval of the Mayor where the wisdom of the contemplated action by the City Council depends upon the judgment of that body. It was there held that the resolution in question was one affecting the interests of the city and never had any validity as a municipal act, because it was not approved by the Mayor or passed over his veto.

It is not unusual to find provisions in city charters requiring that resolutions as well as all other ordinances be submitted to the Mayor for his approval or disapproval.

State v. City Council of Dover, 61 N. J. L., 404.

A provision of a charter requiring every ordinance or resolution of the Common Council to be approved by the Mayor or returned with his objections thereto extends to all acts of that body, whether legislative or otherwise.

People ex rel. v. Schroeder, 76 N. Y. 160.

By our statute the Mayor is made a part of the City Council as well as the aldermen. They must act in conjunction. Should the statute be construed as limiting the right of the Mayor to participate in the administrative or ministerial proceedings of the Council to the mere casting of a vote in case of a tie, or has he been invested with the veto power over resolutions and orders as well as ordinances?

In *Saxton v. City of St. Joseph*, 60 Mo. 156, the court held, following *Saxton v. Beach*, 50 Mo. 488, that the act of the Council alone was not the act of the city, and that a contract could not be let by resolution unless it was passed by

both the Mayor and the City Council, if a resolution was proper at all.

I will now turn to a consideration of the meaning of the words "all ordinances" found in Sec. 18 of Art. 3.

It was held in *Kepner v. Commonwealth*, 40 Pa. St. 124, 130, that the word "ordinance" is a "general term including all forms of regulations by civil authority, even acts of Parliament and by-laws of municipal corporations * * *. 'Ordinance' then, is the general term for acts of council affecting the affairs of the corporation." In that case it was further held that the word "ordinance," found in a provision of the statute under which cities are incorporated, requiring *all ordinances* to be submitted to the Mayor for his approval, etc., will be construed as including resolutions and orders. Otherwise the word "is of no force at all *because it allows its substantial purpose to be defeated by giving to ordinances the form of resolutions.*"

To construe the words "all ordinances" in our statute as including resolutions and orders seems a reasonable construction, for the reason given in the last sentence quoted above from the *Kepner* case. Such a construction obviates the very difficulty which was in the mind of Judge Magruder when he decided the *Mount* case in 186 Ill., as appears from his opinion. I do not find upon examination of the authorities that the *Kepner* case is in conflict with the weight of authority, as stated in the *Burlington* case, decided by the New Jersey Supreme Court. (See language in *People v. Latham*, 203 Ill. 9, 19.)

In *State v. Swindell*, 146 Ind. 527, 532, it was said:

"Under the general term of 'ordinances' have sometimes been included all the regulations by which a corporation is itself governed."

In *Chandler v. Town of Johnson City*, 105 Tenn. 633, 637, it was held that the word "ordinance" as used in a city charter requiring the fixing of the salaries of officers thereby, should be construed as synonymous with "resolution," so that an officer was bound by a resolution fixing his salary. See also, *Campbell v. City*, 49 Ohio St. 463, 470; *Steenerson v. Fountaine*, (Minn.) 119 N. W. 400. In the latter case the *Kepner* case was cited.

An examination of the more recent authorities discloses that where statutes conferring the veto power upon the Mayor are ambiguous, they will be construed as giving the power to veto resolutions as well as ordinances proper, and as giving the Council the right to pass resolutions over a veto in the same manner as the veto of an ordinance is overcome. At least this is true when the resolution is legislative in its nature.

State v. Davis, 116 N. W. 751, 752;

Steenerson v. Fountaine, (Minn.) 119 N. W. 400.

Our Supreme Court in the case of *C. & N. P. R. R. Co. v. City of Chicago*, 174 Ill. 439, 447, has said that the words "ordinances, rules and regulations," as used in Par. 96 of Sec. 1 of Art. V of Part I of the Cities and Villages Act, are identical in meaning. It will be observed that the powers delegated to the City Council by the paragraph mentioned are undoubtedly legislative in their nature, from which it follows that their exercise must be by ordinance (*Village of London Mills v. White*, 208 Ill. 289, 297); but there is nothing in Sec. 18 of Art. III, relating to vetoes by the Mayor, indicating that the veto power might not be exercised with reference to orders or resolutions, unless the words "all ordinances" are to be given this construction. In my opinion Sec. 18 of Art. III, may be construed in connection with Sec. 11 of Art. I, Sec. 1 of Art. III and Sec. 3 of Art. V, so as to give to the Mayor the power to veto "all other ordinances, orders and resolutions," mentioned in Sec. 3 of Art. V, in addition to ordinances passed in the style prescribed by Sec. 2 of Art. V. The words "all ordinances" are general and comprehensive.

Sec. 1 of the Illinois statute on the Construction of Statutes (Hurd's Rev. Stat., 1909, Chap. 131, p. 2171) lays down the following rule for the construction of statutes:

"All general provisions, terms, phrases and expressions shall be literally construed in order that the true intent and meaning of the legislature may be fully carried out."

See also:

Barsaloux v. City of Chicago, 245 Ill. 598, 607.

My conclusion is, that while the Illinois statute is am-

biguous, with reference to the extent of the veto power of the Mayor, the courts might well construe it as authorizing the Mayor to approve or disapprove orders and resolutions as well as ordinances passed in the style prescribed by Sec. 2 of Art. V.

It is entirely clear from all the decisions of our Supreme Court that no legislation can take effect without the Mayor's approval (unless passed over his veto), because it must be embodied in ordinances, and even if embodied in resolutions, such resolutions, in order to be valid, should have to be submitted to him for his approval or disapproval under the authorities.

Sixth: Is the order of April 17, 1911, mandatory as to the Comptroller and Commissioner of Public Works, or does the use of the word "authorized" imply a discretion lodged in each of them as to whether they will or will not exercise the "powers" given by the order?

The decisions are at variance as to whether the word "authorized" is mandatory or implies the idea of discretion. In *Armstrong v. Murphy*, 65 App. Div., 123, 72 N. Y. Supp. 473, 474, the words "authorized and empowered," used in a city charter with reference to the granting of theatrical licenses by the police department were held to vest a discretion in that department. The granting of licenses, particularly saloon licenses, is frequently held to involve some discretion in the executive officer.

In *Veazie v. Inhabitants of China*, 50 Me. 518, 521; *People v. Erie Co. Sups.* (N. Y.) 1 Sheld. 517, 521; *People v. Herkemer Co. Sups.*, 56 Barb. 452, 454; *People v. Otsego Co. Sups.*, 51 N. Y. 401, 405; *Flynn v. Canton Co.*, 40 Md. 312, 319; *Magaha v. City of Hagerstown*, 95 Md. 62, 51 Atl. 832, 835; *Rankin v. Buckman*, 9 Oreg. 253, 262; *Bowen v. City of Minneapolis*, 47 Minn. 115, 116, and *Commonwealth v. Marshall*, 3 Weekly Notes Cas. 182, 185, the courts take the view that the words "power" and "authority" are to be construed as imperative and not discretionary. In nearly all of the above cases the words are found in statutes granting powers to municipal corporations or their legislative bodies.

The powers of cities in this State are vested in the City

Council, and while the City Council may have discretionary powers, it may not delegate legislative powers to executive or administrative officers. An executive officer only has such powers as are expressly granted to him by statute or a valid ordinance, and in the absence of express language to express such an intention, there is no inference that any discretion is invested beyond such as is necessary to carry out the duties expressly imposed upon him.

In my opinion, under the order of April 17, 1911, it is your duty and that of the Comptroller to take the steps mentioned toward the payment of two-thirds of the reserve fund of the Noel Construction Company subject to the express conditions found in said order which relate to proper payments to sub-contractors, etc., and which are in harmony with the general provisions found in Sections 2107 and 2111 of Art. X, Chap. 58 of the Chicago Code of 1911.

Yours very truly,

MACLAY HOYNE,

First Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JUNE 12, 1911.

HON. VERNON L. BEAN, Board of Examining Plumbers.

Dear Sir:

I have your request for an opinion as to your duty to prosecute a certain Mr. Tripp of Homewood, Illinois, who is doing business as a plumber in Chicago by virtue of a license issued by the Board of Examining Plumbers of Blue Island. You state that Blue Island has no authority to issue such licenses because of the fact that the federal census shows its population to be less than 10,000.

The Statute provides that cities, towns or villages of 10,000 inhabitants or more shall organize a Board of Examining Plumbers and that certificates so issued shall be valid in and throughout the state.

The first question is, has the City of Blue Island the right to grant such licenses. If you can show the 1910 federal

census to the effect that the population of Blue Island is less than 10,000 the Court will take judicial notice that such is its population.

In *Chicago & Alton v. Baldrige*, 177 Illinois, page 229, the question arose as to the power of the City of Bloomington to do certain things granted to cities of 10,000 inhabitants. The court says:

“We will take judicial notice of the federal census and that it appears from said census the City of Bloomington has more than 10,000 inhabitants.”

The question is, will the license of Blue Island protect this man when it appears that the City has not sufficient population. In *Back v. The People*, 87 Appellate, page 173, the court says:

“It is contended by plaintiff in error that his license being regular in form, is a complete protection to him and that its validity can not be questioned in a proceeding of this kind. We do not think this position well taken. It was held in *Spake v. People*, 89 Illinois, page 617, ‘That a license issued contrary to law is a nullity. If the license by which plaintiff in error seeks to shield himself was a nullity by reason of having been granted contrary to law it can not afford him any protection.’ Citing cases.”

The following language further occurs which will be helpful in this case:

“It is contended by plaintiff in error that even if the ordinance is invalid and the license and order granting it void they were admissible in evidence to show good faith and the absence of criminal intent on his part. The statute says, ‘Whoever not having a license to keep a dramshop shall sell any intoxicating liquor in any quantity less than one gallon, shall be fined, etc.’

(The Plumbers’ Statute under consideration recites, ‘Any person violating any provision of this act.’) ‘This provision of the statute is without limitation and under it our courts have frequently held that it is not necessary either to aver or prove a guilty intent.’ Citing cases. ‘Absence of guilty intent is consequently no defense in a suit of this kind.’ ”

My conclusion therefore is if the federal census shows the population of Blue Island is less than 10,000, then the

license issued to Tripp affords him no protection and he is subject to prosecution under the statute.

Yours respectfully,

GEORGE L. REKER,
Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,
Corporation Counsel.

JUNE 13, 1911.

MR. C. ST. CLAIR DRAKE, Department of Health.

Dear Sir:

Your communication dated June 8, 1911, addressed to Hon. William H. Sexton, wherein you ask that you be advised if "Homes," "Asylums" and "Similar institutions caring for aged, infirm or convalescing persons" fall within the definition of a "Hospital" as set forth in Section 1102 of the City Ordinance relating to hospitals within the City has been referred to me for a reply.

This particular section is number 1213 of the New Code which reads as follows:

"Hospitals defined; for the purpose of this article a hospital is hereby defined to mean an institution or place used for reception or care, temporary or continuous, of two or more sick, injured or dependent persons; or used for the treatment of two or more persons suffering from or affected with any mental or physical disease or bodily injury, including all hydropathic and massage institutions."

The question is, would "Homes," "Asylums" and "Similar institutions caring for aged, infirm or convalescing persons," fall within the above definition.

Of course, under this definition there is no question but that if any of the aforesaid institutions are places "used for the reception or care, temporary or continuous, of two or more sick or injured persons" or if they are used "for the treatment of two or more persons suffering from or effected with any mental or physical or bodily injury" they would come under this definition.

There are, however, "Homes," "Asylums" and "Sim-

ilar institutions caring for aged, infirm or convalescing persons" which contain "two or more persons" and which are not "used for the reception or care, temporary or continuous, of sick or injured persons" and not "used for the treatment" of "persons suffering from or affected with any mental or physical disease or bodily injury"; as for instance, institutions such as the Industrial School for Girls and similar homes whose primary purpose of existence is not to administer care or relief to sick or injured persons, but for the purpose of giving shelter and protection to certain classes of persons in need of same. If such institutions can be included under the definition of "Hospitals" under the above section, they must be made to fall in the class denoted as "Dependent persons" as named in the above definition.

Vol. 9 of "Cyc," page 277, says "That 'dependent' means relying on for support."

Webster's Unabridged Dictionary defines the adjective "dependent" as "relying on or subject to something else for support; * * * not self-sustaining" * * * and defines the noun "dependent" as "one who depends; one who is sustained by another or relies on another for support or favor. * * *"

It would therefore seem to me that each case must be determined by itself. If the "Homes," "Asylums" and "Similar institutions caring for aged, infirm or convalescing persons" contain two or more persons who are dependent upon the institution for support, or who are not self-sustaining or depend upon the institution for support or favor, then such institution would come under the definition of "Hospitals" as defined in the above section, notwithstanding the fact that there is no medical aid or treatment whatsoever afforded the inmates thereof.

Respectfully submitted,

MAX M. KORSHAK,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JUNE 14, 1911.

HON. EDWARD COHAN, City Collector.

Dear Sir:

I have your request for an opinion as to whether the dollar license plate obtainable under the Wheel Tax ordinance by a manufacturer or dealer in motor vehicles for the purpose of demonstration, is available to a dealer in second-hand automobiles, or should the latter class of persons be required to take out the regular vehicle tax license plate.

I am of the opinion that so far as the provisions of the ordinance in question are concerned, a dealer in new motor vehicles stands on no different footing from a dealer in second-hand automobiles. Indeed, any such differentiation would be so far from being a logical one as to go far toward rendering the ordinance in question invalid. There can not be advanced, in my opinion, any valid reason why a dealer in new automobiles should be able to obtain a demonstrating license for a dollar, while a dealer in second-hand automobiles should be obliged to pay a greater sum for a license granting a like privilege.

The ordinance in question provides in part as follows:

“Provided, however, that if any manufacturer or dealer in any of the motor vehicles mentioned in this ordinance shall make application to the city collector and shall state therein, under oath, that he is such a manufacturer or dealer within the city, and that he desires a license plate to be used by him in testing or demonstrating such motor vehicles upon the streets of the city, and that he will use such license plate only for such purpose, the city clerk shall, upon the payment by such applicant of one dollar to the city collector, issue to such manufacturer or dealer a distinctive license plate with a number thereon, which may be attached to or borne by any such motor vehicle while being operated upon the streets of the city for the purpose of testing or demonstrating such vehicle, and when any such vehicle is in use for such purpose and carries such license plate, no other license fee shall be collected under this ordinance and no other license plate need be affixed to such vehicle; but not to exceed three such license plates shall be issued to any such manufacturer or dealer.”

The word “dealer” in the ordinance, you will note, is not

limited, nor is any differentiation as to dealers, whether second-hand or original, apparent from the language of the ordinance itself.

Persons, therefore, who make it a business of purchasing and selling automobiles, whether one at a time or in greater numbers, come within the provisions of the ordinance above quoted, and are subject to its restrictions as to the number of plates which can be issued to them.

You ask for a concurrence in or affirmation of an opinion from the former Corporation Counsel upon the subject of the number of tags for demonstrating cars allowed to manufacturers of and dealers in motor vehicles. The question under consideration by the then Corporation Counsel in the opinion referred to is somewhat foreign to the question involved in your present inquiry, and not being cognate to the subject of such inquiry, has not been herein considered.

Very respectfully yours,

JOHN G. BECKWITH,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JUNE 19, 1911.

PETER REINBERG, Esq., Chairman, Local Transportation Committee.

Dear Sir:

Replying to the Secretary of your Committee concerning the validity of a proposed ordinance requiring railroads to operate by means of power other than of steam or in a manner that will not produce smoke or noxious gases that injuriously affect the public health, comfort or convenience, I beg to advise you as follows:

In the first place, I believe that the State Legislature has authority to enact a law embodying the principles contained in the proposed ordinance.

The City of Chicago is a subsidiary governing body of the State of Illinois and derives all of its powers from the State Legislature.

Byrno v. Chicago General Ry. Co., 169 Ill. 75. It, therefore, becomes necessary to determine what the board powers possessed by the legislature it has seen fit to grant to the City of Chicago.

By the Cities and Villages Act, which the City of Chicago has adopted, the legislature confers upon said city power by Section 63, chapter 24, S. & C., as follows:

“Twenty-seventh: To require railroad companies to keep flagmen at crossings of streets and provide protection against injury to persons and property in the use of such railroads.”

“Sixty-sixth: To regulate the police of the city or village and pass and enforce all necessary police ordinances.”

“Seventy-fifth: To declare what shall be a nuisance and to abate the same and to impose fines upon parties who may create, continue or suffer nuisances to exist.”

“Seventy-seventh: To do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease.”

Section 6 of Chapter 24 aforesaid provides, and the Supreme Court of this State in *Chicago Dock & Canal Company v. Garrity*, 116 Ill. 155, held that a city does not, by adopting the cities and villages act abrogate the powers conferred upon it by any special charter under which it existed prior to the adoption of the cities and villages act, but that it shall continue to possess the powers conferred by such special charter, except in so far as they are inconsistent with said cities and villages act.

Turning, then, to the charter under which the City of Chicago existed prior to the adoption of the cities and villages act (Tulley Ordinances, 1873, page 403), we find that there is conferred upon the City of Chicago the following power:

“To regulate and prohibit the use of locomotive engines within the city and require railroad cars to be propelled by other power than that of steam,” etc.

It is held in *Chicago & Northwestern Ry. Company v. City*, 140 Ill. 309, and *C. B. & Q. R. R. Company v. People*, 200 U. S. 561, that the police power encompasses provisions for the public health, safety, comfort and convenience. It would,

therefore, seem that in so far as it lies within the power of the State so to do, it has conferred upon the City of Chicago plenary power to pass an ordinance of the nature of that involved in your inquiry.

In *North Chicago City Ry. Co. v. Lake View*, 105 Ill. 207, the court had before it an ordinance passed under a clause substantially identical with clause 75 heretofore quoted, by virtue of which Lake View passed an ordinance prohibiting the North Chicago City Ry. Company from propelling cars in the streets of the village by use of steam. After quoting the provisions of the village charter, which, as above suggested, is substantially identical with the clause above quoted, the court at page 211 says:

“These provisions, in the absence of any legislative grant authorizing the use of steam as a motive power for the purpose of propelling street cars, we are of opinion warranted the town in passing the ordinance in question.” Continuing at page 212 the court says:

“As already conceded, there are many innoxious useful things which the municipal authorities of a town or city could not lawfully, under a general grant of power like the one in question, declare nuisances, such for instance, as the exercise of certain trades and callings, as, that of a physician, druggist, and the like, in all such cases as these, courts, acting upon their own experience and knowledge of human affairs would say, as matter of law, the exercise of these trades or callings, or things of like character, are not nuisances, and that any attempt to so declare them by the municipal authorities would be an unwarranted abuse of their power. On the other hand, there are many things which courts, without proof, will, on the same principle, declare nuisances. Such, for instance would be the digging of a pit, or the erection of a house, or other obstruction in a public highway; and an ordinance passed by a town or city having, as in the present case, a general power over the subject declaring such obstructions nuisances, would be valid on its face, and a conviction might properly be had under it, without any extrinsic proof to show the act complained of was in fact a nuisance. In all such cases it is sufficient to show the existence of the fact constituting the nuisance. And so we regard the use of steam, in the manner specified in the ordinance for the use of propelling street cars along a public street in a thickly populated town,

in the absence of any legislative grant authorizing it to be done. Such a use of steam, under the circumstances stated, is, *per se*, a nuisance."

In *Harmon v. City of Chicago*, 110 Ill. 400, the court had before it an ordinance prohibiting the emission of dense smoke from the smoke stack of any boat or locomotive, etc. In speaking concerning the power of the city to pass the ordinance, the court, at page 408, says:

"The delegated power in the City is broad enough to warrant the passage of the ordinance, but back of that is the question, what may the State rightfully do in such matters? It will be conceded the municipality can do nothing the State cannot authorize it to do, and that all power a municipal corporation created by special or general laws may exercise emanates from the State creating it. What powers then reside in the State? It has all power necessary for the protection of the property, health and comfort of the public, and that power has been so frequently defined by this court is not necessary to restate it. Its power, in this respect, the State may delegate to local municipalities, and in such measure as may be deemed desirable for the best interests of the public, and the State may resume it again when deemed expedient."

And continuing the discussion, the court, at page 414 of the opinion says:

"In view of the magnitude of the interests involved, it is suggested it will not do to allow the common council to place an embargo on all the interests that have to use this coal. It may be that some, and perhaps a very great, inconvenience would be experienced by a rigid enforcement of the provisions of this ordinance. How that may be this court can not know. What powers the City Council may exercise under the general law or under its police powers, is a question of law to be determined by the courts; but when the city council will exercise the powers with which it is clothed, rests in its legislative discretion, and the consequences that may flow from the enforcement of ordinances enacted within powers conferred, rest alone upon the body enacting them, and with which the courts can have no concern."

Concerning the inquiry as to whether or not an ordinance of the nature involved in the communication of your Secretary is valid, in that it pertains to railroad companies alone, I beg

to advise you that an ordinance to be valid need not operate alike upon all persons in the municipality, but the city council may make classifications, and if the ordinance affects alike all persons within the classification, it is valid. The rule in this regard is announced by the Supreme Court of this State in *Douglas v. People*, 225 Ill. 536, wherein the court at page 545 says:

“A law is said to be general and uniform not because it operates upon every person in the State alike but because it operates alike upon every person in the State who is brought within the conditions and circumstances prescribed by the law.”

In *District of Columbia v. Brook*, 214 U. S. 138, the court held that a law having as its basis of classification the difference between residents and non-residents, was valid.

Other cases sustaining the right of the law making body to make classifications are—

Meath v. Worst, 207 U. S. 338.

Metropolis Theater Co. v. Chicago, 246 Ill. 20.

Douglas v. People, *supra*.

Any ordinance which is passed should of course provide that the time within which the railroad companies should comply with the duties imposed upon them should be commensurate with the magnitude of the task which the ordinance requires them to perform.

The contention will no doubt be made in the event the railroad companies question the validity of such an ordinance that they have certain rights under their respective charters, whether special or granted under the general law providing for the incorporation of railroads, which are protected by the Constitution. This argument will probably be advanced upon the theory that the railroad companies have built their lines over certain rights of way before certain numerous streets were opened up across such rights of way, and upon the further theory that at the time most of their charters were granted steam was the only adequate motive power then adaptable and that on account of the imperfect development of smoke consumers in locomotives at that time the legislature contemplated that it was necessary in the operation of loco-

motives to emit dense clouds of smoke and other noxious gases and that their right to so operate locomotives is, therefore, protected by their charters. This position is not tenable. All corporations must accept their charters subject to the police power of the State.

In the case of *Illinois Central Railway Company v. Slater*, 129 Ill. 91, the company claimed to be exempt from the effect of a general statute of the state applying to all railroads making different requirements from those contained in the charter of that railroad company with reference to giving signals at public highway crossings. The court said at page 98:

“The principle objection urged to these is that inasmuch as appellant’s charter defines its duty as to the giving of such signals differently from the statute, it was error in the court below to require of appellant’s servants a compliance with the statute. The question here sought to be raised is not an open one in this court. The right to impose these and other like duties upon railroad corporations, by statute, grows out of the police power which may be exercised by the legislature, at its discretion, as the public safety requires.”

In the case of *Toledo, Wabash & Western Railway Company v. Jacksonville*, 67 Ill. 37, the court with reference to this police power of the state said:

“This power is inherent in the state and it cannot part irrevocably with its control over that which is for the health, safety and welfare of society.”

The law upon this subject is well settled in this State by the following authorities:

Galena & Chicago Union R. R. Co. v. Loomis, 13 Ill. 548.

The Bank of the Republic v. County of Hamilton, 21 Ill. 53.

The Ohio & Mississippi R. R. v. McCellan, 25 Ill. 123.

The Town of Lake View v. Rosehill Cemetary, 70 Ill. 191.

Ruggles v. The People, 91 Ill. 256.

Concordia Cemetery Assn. v. Minnesota & Northwestern Railroad Co., 121 Ill. 199.

C. C. C. & St. L. R. R. Co. v. The People ex rel. Jett, 173 Ill. 359.

I am, therefore, of the opinion that the City Council has the power to enact such an ordinance and that it would be valid and binding, but inasmuch as the draft attached to your communication was intended to afford only a basis of discussion and not as a final form which such an ordinance should take, the ordinance should be redrafted by this department before it leaves your committee.

I am also of the opinion that any ordinance passed should direct what should be done or omitted, but should leave the railroad free to adopt their own methods to accomplish the desired result.

Yours very truly,

CHAS. M. HAFT,

LEE D. MATHIAS,

Assistant Corporation Counsels.

Approved:

WM. H. SEXTON, (Signed.)

Corporation Counsel.

CHICAGO, JUNE 19, 1911.

H. B. WHITE, Esq., Secretary, Committee on Finance.

Dear Sir:

With reference to your communication of June 9th, 1911, asking for an opinion as to the liability of the city for a refund of \$10.00 paid by Hibbard, Spencer, Bartlett & Co., for a license to sell cartridges and shells, I beg to state that the matter has been referred to me and I desire to submit the following:

In this case, if I understand you correctly, Hibbard, Spencer, Bartlett & Co. first took out a license to sell cartridges and shells for the sum of \$10.00, and later desiring to enlarge their powers, took out a license to sell gun powder, explosives, etc., paying therefor \$25.00, which latter license includes the power to sell cartridges and shells. Upon this representation the Company demands a refund.

You also inquire as to the smaller proposition as to the right of a licensee who has taken out a delicatessen license and subsequently thereto a meat license to secure a refund of his money paid for a delicatessen license, which would be included in the meat license.

First, I beg to call your attention to the Chicago Code of 1911, Section 1516:

“In no event shall any rebate or refund be made of any license fee or part thereof by reason of the death of the licensee, or by reason of non-user of such licensee, or by reason of a change of location or occupation of such licensee.”

This would seem to settle the question in all cases as to a refund and the courts have further substantiated this position in a great many instances.

Trainer v. Multnonah, 2nd Oregon, p. 14.

“The payment of a license fee is a condition precedent not a deposit, and the fee goes at once into the general fund.”

This settles the statute of a license fee as to what it actually is, and the court has held here that there is no contractual relation between the city and the licensee, but rather the money is paid as a precedent only to secure the license, and in all the cases you ask about, it would then be held that this money was merely paid as a condition precedent to secure the license and there would, therefore, be no liability upon the city to refund the money if the licensee failed to use the license granted or later to secure a license which included also the powers of the first license.

In a case where a license fee was paid and the license granted to the licensee upon a petition of a majority of the inhabitants and later the license was revoked by an order prohibiting the sale of liquor, the court held in *Clayton v. Hot Springs Co.*, 53 Ark. 236, that the license fee could not be refunded.

And in *Conkling v. City of Springfield*, 132 Ill. 423:

“A party who has paid voluntarily under a claim of right shall not afterwards recover back the money, although he protested at the time against his liability. But it is otherwise when a party is compelled by duress of his person or goods to pay money for which he is not liable. It is not voluntary but compulsory and he may rescue himself from such duress by payment of the money and afterwards on proof of the fact recover it back.”

But in this case the facts show and in all these cases of a

similar character where a license is secured and then later another license is secured which gives greater powers and includes the first license that there is no duress and that the money is paid voluntarily and as a condition preceeding to secure the smaller license. Hibbard, Spencer, Bartlett & Co., at the time they took out the license to sell cartridges and shells were charged with a knowledge of a license to sell gunpowder, explosives. They took out the license which gave them full rights under that license to sell cartridges and shells voluntarily and without duress. Later on they got much larger powers under the license to sell gunpowder, explosives, which included the license power already secured. The Company got what it wanted under each license and it cannot now be argued that there is any imposition or unjust charge. There is no contention that the license to sell cartridges and shells was invalid, nor that the money was paid under compulsion and to authorize the recovery of money paid as a tax, two things must occur. First, the tax must have been illegal and void, second, it must have been paid under compulsion or its equivalent. *Lyon v. Cook*, 9 Brad. 545.

In the Hibbard, Spencer, Bartlett Co. case and in all other cases, neither of the above conditions occur. Therefore, I am forced to conclude that under our ordinance, namely 1516, the Chicago Code of 1911, and upon the proposition that a license fee is paid as a condition precedent and is not a deposit and further to recover any money so paid, it must be shown that the money was paid under duress, which does not occur in any of these cases. And it is conceded that the ordinances which grant the licenses are valid. Therefore, in the Hibbard, Spencer, Bartlett Co. case, or in any case of a similar character, where the facts are the same, the city is in no way liable to refund money paid under these conditions.

Respectfully,

HARRY J. GANEY,

Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,

Corporation Counsel.

JUNE 19, 1911.

HON. MURDOCH CAMPBELL, Commissioner of Buildings.

Dear Sir:

Your communication, dated May 23, 1911, and countersigned by E. F. Kelling, Chief Theater Inspector, addressed to Hon. William H. Sexton, Corporation Counsel, wherein you ask for an opinion as to the legality and policy of recommending a reissuance of a theater license for the operation of a vaudeville and moving picture theater in the brick building located at No. 335-337 North avenue, known as Sittners Theatre, has been referred to me for a reply.

I further understand from your letter that the building in question is of ordinary construction located on the third floor, twenty-eight feet above the sidewalk level with a seating capacity of about eight hundred.

You further state that this building in question complied with the old ordinances which allowed rooms for vaudeville purposes to be located not more than 30 feet above the sidewalk level and that Section 330 of the Chicago Code of 1911, provides that buildings of Class IVc existing at the time of the passage of the ordinance shall comply with the provisions of Class IVb.

You further say that Section 306 (Limitations of Floor Levels), provides that no room having a greater seating capacity than five hundred, shall be at a greater distance from the sidewalk than twenty feet and this restriction refers to buildings *hereafter* erected, but that the word "occupied" in this section creates a doubt in your mind as to whether this section applies to buildings in existence at the time of the passage of the ordinances in question, as well as to buildings erected after its passage.

Section 306 of the new Code of 1911, Chapter 16 on buildings, provides:

"306. LIMITATIONS OF FLOOR LEVELS—HEIGHT ABOVE SIDEWALK.) (a) The following limitations of floor levels in buildings *hereafter* erected, *occupied* either wholly or in part for the purpose of Class IVb, shall be as follows:"

Then follows restrictions as to the height above the ad-

jacent sidewalk grades of rooms having different seating capacities.

The specific question is whether the word "occupied" in the third line of this section refers to buildings "occupied either wholly or in part for the purpose of Class IVb" or refers to the predicate "shall be" in the fourth line of this section.

The board rule generally laid down in the construction of ordinances is that they are always to be construed most strictly against the municipality.

In statutes intended to operate in the future only, a retroactive effect will not be given unless it clearly appears that such was the intention of the Legislature, particularly if the rights of the public or any individuals, may be injured thereby. (*Russell & Allen Drainage Dist. v. A. J. Benson et al.*, 125 Ill. 490; *Marsh v. Chestnut*, 14 Ill. 223; *Hyman v. Bayne*, 83 Ill. 256) the rules for the construction of statutes being the same as those for the construction of city ordinances.

I. C. R. R. Co. v. City of Chicago, 169 Ill. 329.

Stanton v. City of Chicago, 154 Ill. 23.

Upon a careful reading of Section 306 it strikes one that the language is plain and unambiguous and that the word "occupied" refers to buildings and that this section applies to "buildings occupied either wholly or in part for the purpose of Class IVb" and not to the words "shall be." In other words, the section may be read as follows:

"The following limitations of floor levels in buildings occupied either wholly or in part for the purpose of Class IVb, *hereafter erected*, shall be as follows;" etc.

I am, therefore, of the opinion that this section does not refer to or have any application to buildings in existence at the time of the passage of the aforesaid ordinance, and that the building department is powerless to order any changes upon the theater in question under this section.

I desire, however, to call your attention to Section 202 of the code, which provides that whenever the commissioner of buildings shall find any building or structure, or part thereof, in the city in such an unsafe condition as to endanger life, but in such condition that by the immediate application

of precautionary measures such danger may be averted, he shall have authority, and it shall be his duty to forthwith notify in writing, the owner, agent or person in possession, charge or control of such building or structure, or part thereof, to adopt and put into effect such precautionary measures as may be necessary or advisable in order to place such building or structure, or part thereof, in a safe condition, and that such notice shall state briefly the nature of the work required to be done and shall specify the time within which the work required to be done shall be completed by the person, firm or corporation notified. Said section further provides that if at the expiration of the time specified in such notice, the owner shall not have complied with same, then it shall be the duty of the commissioner to tear down or destroy that part of said building or structure which is in such an unsafe condition as to endanger life or property.

It is your duty under the ordinance to determine what is an "unsafe condition as to endanger life."

Very respectfully yours,

MAX M. KORSHAK,
Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,
Corporation Counsel.

JUNE 19, 1911.

HON. JOHN MCWEENY, General Superintendent of Police.

Dear Sir:

We have your letter of the 8th instant. in which you enclose an application of the American Secular Union and Free Thought Federation for a permit to hold open air meetings at designated places in the City of Chicago. In this letter you further inform us that you have at different times received complaints from various people on account of the remarks made by the speakers of this Association; and express the opinion that such remarks would tend to a breach of the peace. The question which you ask us to answer at the close of your letter is whether or not you are compelled to issue the permit demanded in this case.

We have examined the application referred to in your letter. It purports to be made in pursuance of Section 2128 of the Revised Municipal Code of 1905, and it asks for a permit to hold open air meetings at certain specified places on streets in the city and at certain specified hours, the purpose of said meetings being stated to be to disseminate and advertise the nine "demands of liberalism" as shown on the upper left hand corner of the application.

We also have under consideration a letter also dated June 8, 1911, addressed to the Corporation Counsel by Mr. H. H. Van Meter on behalf of the Chicago Christian Endeavor Union asking for the assistance of the Corporation Counsel in procuring a permit similar to that asked for in the other instance above referred to, and stating that such permits have heretofore been always granted to this organization and have never been refused until the present time by any administration. Mr. Van Meter also encloses an application dated May 18th, 1911, by the Moody Church for a similar permit. This application is addressed to the Chief of Police. We assume that this application has also been declined by you.

We shall deal with these three instances together.

There are certain provisions of the Illinois Constitution of 1870 intended to secure the right of free speech and the right of free assemblage. (See Art. V, Secs. 4 and 17.) The First Amendment to the National Constitution provides that Congress shall make no law abridging the freedom of speech or the right of the people peaceably to assemble. This, however, is a restraint only on the power of Congress and not on the power of the State legislatures. To what extent the State legislatures may be restricted from interfering with these privileges of free speech and free assemblage by the provisions of the Fourteenth Amendment to the National Constitution is a question which, so far as we know, has not yet been definitely answered by the Supreme Court of the United States.

There have been quite a number of decisions by the Supreme Court of Illinois and the Supreme Courts of other states bearing on the question of just how far State legislatures, or the governing powers of municipal corporations,

can go in the direction of prescribing the conditions under and subject to which meetings may be held or speeches may be made to assemblages upon the public streets, without coming in conflict with the provisions of the National or State Constitution. Among these decisions are:

- City of Chicago v. Trotter*, 136 Ill. 430 (1891);
- City of Bloomington v. Richardson*, 38 Ill. App. 60 (1890);
- Rich v. Naperville*, 46 Ill. App. 222 (1891);
- Re Garrabad*, 84 Wis. 585; 19 L. R. A. 858;
- Re Frazee*, 63 Mich. 396;
- Love v. Phalen*, 55 L. R. A. 618 (Sup. Ct. of Mich. 1901);
- Anderson v. Wellington*, 40 Kan. 473; 28 L. R. A. 110;
- City of Chariton v. Simmons*, 87 Ia. 226;
- Commonwealth v. Plaisted*, 148 Mass. 375;
- Commonwealth v. Davis*, 162 Mass. 510; 26 L. R. A. 712 (Affirmed by Sup. Ct. of U. S. in 167 U. S. 43.)

These decisions are far from being in accord. To illustrate this, we may point out, that in the first case cited the Supreme Court of Illinois held void an ordinance of the City of Chicago which provided that no parades or processions should be allowed upon the streets until a permit therefor should be obtained from the police department. This decision seems to have proceeded upon the ground that the discretion vested in the Chief of Police or in the Police Department was too broad and absolute. The ordinance should have prescribed the conditions upon which the permit should be granted. On the other hand, in the case last cited, the Supreme Court of Massachusetts, and on writ of error the Supreme Court of the United States, held valid an ordinance which provided that no person shall in or upon any of the public grounds make any public address, discharge any cannon, etc., etc., except in accordance with a permit from the Mayor.

Having regard to the view which we take of the particular ordinance under which the applications submitted to us are made, it will not be necessary for us to examine these authorities in detail, or to endeavor to deduce from them any definite

conclusions as to the extent to which the city could go, under the Constitution, in the direction of prescribing or regulating meetings on the public streets.

The ordinance under which the permits are asked is Section 2128 of the Municipal Code of 1905. This section now stands without amendment as Section 2433 of the new Municipal Code. It provides that "no parade or procession shall be allowed upon any street or public way in the city, nor shall any open air public meeting be held upon any ground abutting upon any street or public way in the city until a permit in writing therefor shall first be obtained from the police department." The ordinance then proceeds to prescribe how the application for a permit shall be made to the superintendent of police, and the investigation which the superintendent is required to make before granting the permit, and it concludes in this way, "and if he shall find that such parade, procession or open air public meeting is not to be held for any unlawful purpose and will not in any manner tend to a breach of the peace, or unnecessarily interfere with the public use of the streets and ways of the city or the peace and quiet of the inhabitants thereof, he shall issue such permit to the person, etc."

We understand, as the result of our conference with you, that it has been the practice in past years for the Chief of Police, or the District Inspectors, to grant, under this ordinance, permits to hold meetings or deliver addresses on the streets at certain specified places and at certain specified times. We understand further that this practice has been recently suspended, and that your present attitude is to grant no further permits of this class until you have been advised in the matter by the Corporation Counsel.

It will be observed that the ordinance in its first paragraph distinguishes between parades or processions to be held *upon the streets* and open air public meetings to be held *upon ground abutting upon some street*. What exactly may be meant by "ground abutting upon any street", and whether the Council intended to forbid the holding of public meetings on private property without a permit from the Chief of Police, or whether it intended by the provision "ground

abutting upon any street" to include only public spaces, such as small parks, etc., we need not here undertake to say. It is sufficient for our present purpose to say that "ground abutting upon any street" does not mean the street itself. The phrases "any street" and "ground abutting upon any street" are here used in strict contradistinction, and it would be difficult for the ordinance to indicate more clearly than it does that they are not intended to mean the same thing.

The ordinance which was before the Supreme Court of Illinois in the case of *City of Chicago v. Trotter*, 136 Ill. 430, cited above, was identical with the ordinance now in question, so far as regards the particular feature we are here discussing, but in that case, the court dealt only with processions upon the streets, and did not throw any light upon the question as to what may be the proper interpretation of the provision as to public meetings on ground abutting on a street.

It may also be noted here that an effort to amend this ordinance was made in the spring of 1908. The proposed amendment was drafted in this office and was accompanied by an opinion written by the assistant who drafted such proposed amendment. It proposed to amend the ordinance in (amongst others) the following respects:

(1) Public addresses delivered to two or more persons were specifically dealt with in the amendment as well as public meetings.

(2) Meetings and addresses held or made *upon the streets* are dealt with as well as meetings held *upon ground abutting on streets*.

It would seem, therefore, that the attention of this office had, at this time, been called to the fact that the ordinance, as it stood, did not provide for the granting of permits to hold meetings upon the streets, and, in fact, did not deal at all with the question of the holding of meetings on the streets.

For some reason the amendment just referred to was never passed.

In conclusion, we answer your question by saying that you are not required to issue the permit asked for. This is irrespective of the question as to whether or not, in any par-

ticular case, you may be of opinion that the kind of speech proposed to be delivered will tend to a breach of the peace. You are justified in refusing to issue any permits for the holding of public meetings upon the streets.

We have expressed no opinion upon the question of what conduct upon the part of those holding or attempting to hold such meetings would justify you in interfering with them or preventing them from holding their meetings or making their speeches. This is a question entirely distinct from the question of whether or not you are required to issue the permit asked for, and upon this question we do not understand you to ask for any advice from this department at present.

Yours very respectfully,

WILLIAM DILLON,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

CHICAGO, JUNE 23rd, 1911.

MR. JOHN F. PEACOCK, City Real Estate Agent, Department of Finance.

Dear Sir:

Mr. Wm. H. Sexton, Corporation Counsel, has referred to me your communication dated June 13th, 1911, wherein you ask that you be advised as to whether the City is bound to pay to the American Sugar Refining Company, at 18th Str. and the River, the sum of \$3,000, for five years' rent at \$600 per annum, from May 1st, 1906, to May 1st, 1911. From your letter, I understand that the City has been occupying the land in question for the storage of lumber and other material used by the City Bridge Division, and that the City has not at any time made a lease with the owner for the premises, that no objection was ever made against the occupancy by the City and that no rent was demanded until April 26th of this year, when the matter was called to the City's attention. Your query is considering the amount of rent reasonable for the premises occupied, is the City bound to pay this claim?

I have tried to get a little additional information and understand that the premises in question have been occupied by the City for the last fifteen or sixteen years. I have not been able to ascertain in detail how the premises became occupied by the City in the first instance except some general information that some foreman some fifteen or sixteen years ago instructed his workmen to deposit lumber and other material upon the premises and that a custom was established which no one ever thought of questioning.

Chapter 24 of Star & Curtis Revised Statute, para. 91, reads as follows:

“Neither the City Council nor the Board of Trustees, nor any department or officer of the corporation shall add to the corporation expenditures in any one year anything over and above the amount provided for in the annual appropriation of that year, except as is herein otherwise specially provided.”

Para. 92 of the same chapter reads:

“No contract shall be hereafter made by the City Council or Board of Trustees or any committee or member thereof, and no expense shall be incurred by any of the officers or departments of the corporation, whether the object of the expenditure shall have been ordered by the City Council or Board of Trustees or not, unless an appropriation shall have been previously made concerning such expense, except as is herein expressly provided.”

It will be thus seen that para. 91 restricts the City Council from adding to the Corporation expenditures over and above the amount provided for in the annual appropriation for the year and para. 92 provides that neither the City Council nor any committee shall contract unless an appropriation shall have been previously made concerning such expense. I assume that no appropriation had been previously made concerning the matter in question.

By section 36 of the Municipal Code the Comptroller “is authorized to execute any and all leases of real property to which the City may be a party either as lessor or as lessee whenever he shall find it necessary to secure private property for the use of the City * * * provided that no lease, to run for more than two years, shall be executed without the special approval of the City Council.”

The Code does not provide that any other person may execute leases for real property and the conclusion which I reach is that the Comptroller is the only authorized person to execute leases. Had there even been a written lease for the premises in question, such lease would not be good unless executed by the Comptroller according to sec. 36 of the Code just referred to.

There being no claim that the City occupied the premises by virtue of an actual contract entered into between the parties, the question then presents itself, can the City be held liable for rent under an implied lease for the property above described for the period of five years?

In the case of *Trustees of Lockport v. Gaylord*, 61st Ill. 276, the Court said:

“Statutes have become to the City of Chicago its organic law and by the law settled principles of law it follows that neither the corporation nor its officers nor any of them can make any contract or incur any liability not authorized by organic law.”

Dillon on Municipal Corporations, sec. 457, says:

“The Corporation is bound only when its agents or officers by whom it can act alone, if it acts at all, keep within the limits of the chartered authority of the Corporation. The history of the workings of municipal bodies has demonstrated the salutary nature of this principle and that it is the part of pure wisdom to *keep the corporate wings clipped down to the lawful standard*. It results from the doctrine that contracts not authorized by the Charter or by other legislative act, that is * * * are void, and in actions thereon the corporation may successfully interpose the plea of ‘*ultra vires*’, setting up as a defense its own want of power under its Charter.”

It thus appears clear that neither a foreman nor his workmen, nor anybody else not authorized in the manner provided in our Code, can bind the city by any legal liability, and it is a rule of law that persons contracting with a municipal corporation must at their peril inquire into the power of the corporation or its officers to make contracts. *City of Chicago v. The Shober & Carqueville Lithographing Company*, 6 Ill. App. 560.

It is well settled, moreover, that a municipal corporation can act through its authorized agents only and that when

the powers of the corporation or its agents are subjected by law to restrictions with respect to the subject matter of contract as to form or method of contracting which are limitations upon the power itself, the corporation cannot be held in such case by either an expressed or an implied contract in defeasance of such restrictions. *Jersey City Supply Co. v. Jersey City*, 71 N. J. 631.

In this last case the court says:

"Thus where—by a law, a municipal corporation is disabled from making an expressed contract for a certain purpose, it cannot be liable upon an implied power having the same subject matter" (Citing *Cory v. Chosen Freeholders*, 44 N. J. L. 445).

28 "Cyc", p. 667, says:

"It has been held that a contract will not be implied which is '*ultra vires*'; or forbidden by law, or made by an unauthorized person or in a manner unauthorized."

The City not being liable under an implied contract for the reason that the contract was made by an unauthorized person or in a manner unauthorized if made at all, the next question presents itself as to whether the acceptance of benefits by the City for many years will not render it liable to pay for the value of the benefits received. In the case of *Roefeld v. The City of Chicago*, 231 Ill., p. 470, says:

"Where there is a statute or ordinance prescribing the method by which an officer or agent of a municipal corporation may bind the municipality by contract, that method must be followed, and there can be no implied contract or implied liability of such municipality. Where the agents of a City are restricted by law as to the method of contracting, the City cannot be bound otherwise than by a compliance with the conditions prescribed for the exercise of the power. (*School Directors v. Fogleman*, 76 Ill. 189; *Tamm v. Lavalley*, 92 *id.* 263; *Rogne v. People*, 224 *id.* 449.) The performance of work or furnishing material for a city and the acceptance of the resulting benefits will not render it liable to pay if the work was not authorized. The fact that the labor is beneficial will not create a liability. (*Hope v. City of Alton*, 214 Ill. 102.)"

In consideration of the foregoing, I am 'herefore of the opinion that the City of Chicago is not liable to the American Sugar Refining Company for the payment of the bill pre-

sented to the City in the sum of \$3,000, and advise the City not to pay it.

Yours respectfully,

MAX M. KORSHAK,
Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,
Corporation Counsel.

JUNE 23, 1911.

JOHN ERICKSON, Esq., City Engineer.

Dear Sir:

We have your letter of the 15th instant, in which you ask us to advise you as to whether the city should pay one-half of the cost of the bridge which, it is proposed, shall be constructed to carry the tracks of the C. & W. I. R. R. Company over two water pipes which are to be laid by the city in 104th street where said tracks cross said street. You state that the purpose of the proposed bridge to be two-fold, namely:

(1) To protect the pipes from damage by reason of jarring occasioned by the passage of trains; and

(2) To provide a convenient working space beneath the bridge for laying the pipes.

You state that "this street has never been laid out across the railroad right-of-way." We infer, however, from the other statements in your letter, as well as from the blue print which accompanies your letter, that there is a street there, known as 104th street, which has been duly dedicated and accepted by the city, and which the city has the right "to lay out across the railway right-of-way", if and when it desires to do so, and that it is upon and along this street that the city purposes to lay these water pipes. We further assume that this street was there at the time the railroad acquired its right-of-way.

If we are wrong in either of these assumptions, please state the facts to us and we shall then advise you further.

When a city allows a railroad company to lay its tracks upon or across a public street of the city, the user of the

railroad company under the franchise granted to it is subject to the right of the city to use and improve the streets for all legitimate purposes for which streets are commonly used, including the laying of sewers and water pipes.

C. B. & Q. R. R. Co. v. City of Quincy, 136 Ill. 563.

C. B. & Q. R. R. Co. v. City of Quincy, 139 Ill. 355.

Kirby v. Citizens' Railroad Company, 48 Md. 168; 30 Am. Rep. 455.

We are of the opinion, therefore, that the city has the right to lay its water pipes along this street, and under the tracks of the railroad company, without asking the permission of the Company. The city would be obliged, however, to take reasonable precautions to support the tracks of the railroad while the pipes are being laid, so as to do as little damage as reasonably consistent with the doing of the work needed for laying the pipes.

This last qualification suggests another question which will have to be dealt with before your query can be fully answered. This is rather an engineer's question than a lawyer's question. You tell us that the total cost of the proposed bridge will be about \$500.00; and that the company asks the city to pay one-half of this and offers to keep the bridge in repair, when once constructed, at its own cost. It may be that it would be good policy for the city to pay \$250.00 and have this bridge constructed, notwithstanding that it has the right to go ahead and lay these pipes without contributing to the cost of the bridge. From what you tell us it is plain that it will cost more to put the pipes under the tracks without the bridge (the reasonable precautions above referred to being taken) than with the bridge. Furthermore there will be a greater probability of leakage in the pipes without the bridge than with the bridge, for reasons indicated in your letter. It is plain, therefore, that it might be wise for the city, from a financial point of view, to pay \$250.00 and have the bridge built and kept in repair by the Company.

But as we have intimated above, this is not a lawyer's question. We can only advise you as to the legal rights of the city in regard to the laying of pipes under the tracks. The question lastly referred to above is one which you must de-

cide for yourself according to your estimate of the probable cost to the city of either method of doing the work.

Yours respectfully,

WILLIAM DILLON,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JUNE 29, 1911.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

I have a communication addressed to you by Mr. William A. Johnson, Meter Rate Taker, Water Department, which has been referred by you to this department.

In his letter Mr. Johnson complains that a fund known as the Municipal Employees' Pension Fund does not exist and desires the money he has contributed during the last five years to such fund to be returned to him.

An Act entitled "An Act to provide for the formation and disbursement of a municipal employes' pension fund in cities having a population exceeding one hundred thousand inhabitants" was adopted by the General Assembly May 16, 1905. In force July 1, 1905. Section 1 thereof provides:

"That the board of aldermen in cities having a population exceeding one hundred thousand inhabitants shall have power and it shall be its duty to create a municipal employes' pension fund, which shall consist of amounts retained from the salaries or wages of employes, as hereinafter provided, * * *."

Section 2 of the Act provides that the term "employe" shall include all employes in the water works or water department of the city receiving \$60.00 per month or over.

Section 4 provides:

"The board of aldermen shall, in the month of September following the passage of this act, arrange for the election of a board of trustees of said pension fund, composed of six members to be chosen as hereinafter provided, which election shall be held not later than October 30th of the same year."

Hurd's Rev. Stat. 1909, p. 495, etc.

No legislative action of any description whatsoever was taken by the board of aldermen or by the city council after the passage of this Act until October 23, 1905, when the following order was introduced and passed:

“WHEREAS, At the last session of the General Assembly, State of Illinois, an act was passed providing for the formation and disposition of a Municipal and Employes Pension Fund, and

WHEREAS, Section 4 of said act provides that a Board of Trustees shall be elected, which shall have the power to administer the funds created by the provisions of said act, and

WHEREAS, Section 4 also provides that an election for such Trustees shall be held not later than October 30th of this year, and

WHEREAS, Said election must, by the terms of said act, be arranged for by the Board of Aldermen of cities wherein such act shall be enforced, therefore be it

ORDERED, That on Monday, October 30, 1905, between the hours of 1 and 5 p. m., that an election be held in the Council Chamber, City Hall, City of Chicago, for the purpose of electing a Board of four trustees, who shall have power and whose duty it shall be to administer the funds for the Municipal Employes' Pension Fund; that the voting at said election shall be by ballot, each member participating therein having the right to vote for four trustees, the two receiving the highest number of votes to be elected for the term of two years and the two receiving the next highest to be elected for a term of one year as provided by said act; that the City Clerk appoint two of his deputies to act as tellers and that they announce the result of said election; provided, however, that the City of Chicago shall be put to no expense for the conduct of such election except the time of the tellers.”

Council Proceedings of October 23, 1905, p. 1291.

The courts have held that acts of legislation by a municipal corporation which establish a permanent rule of conduct or government and which are to have continuing force and effect, must be established by ordinance.

Village of Altamont v. B. & O. S. W. Ry. Co., 184 Ill. 47, 51.

And it has also been said an ordinance prescribes a permanent rule of conduct or government, while a resolution is of a special and temporary character. Acts of legislation by a

municipal corporation, which are to have continuing force and effect, must be embodied in ordinances, while mere ministerial acts may be in the form of resolutions.

C. & N. P. R. R. Co. v. City of Chicago, 174 Ill. 439, 443-5.

In the present case there seems to be a total lack of any ordinance or even order or resolution creating a municipal employe's pension fund in obedience of the mandate or direction of the statute. As the creation of a pension fund would not be a matter of a temporary nature, it could not, under the decision above quoted, be accomplished by a mere order even if the order of October 23, 1905, could be considered as having in view the creation of the fund. Such intention, however, is not apparent from its terms, it being merely an order for an election conformably with the provisions of Section 4 of the statute. This order, therefore, cannot possibly, in my opinion, be held to be the legislation mentioned in the statute for the creation of the fund.

I am inclined to the view that the legislature did not consider the provision for the creation of the fund by the board of aldermen as a mere superfluous and unnecessary portion of the act for the reason that this provision is absent in other pension laws, notably the police pension act and the firemen's pension act. In the latter acts the fund was directly created by the legislature itself and required no precedent act to be taken by the board of aldermen or city council. The legislature, therefore, having for years passed pension acts in which the interposition of the board of aldermen was not necessary, the insertion of a clause requiring some precedent action by the city council cannot be considered as meaningless or unnecessary.

The power to create the fund is delegated to the city by the legislature, but such power remained dormant until called into activity by appropriate legislation on the part of the board of aldermen. This power to create the fund has never, as I have hereinbefore pointed out, been exercised. The so-called municipal employe's pension fund (applicable to employes of the Water Department) has, therefore, not even a *de facto* existence. A *de facto* existence can only arise where

there is an original creation of the fund *de jure*, and this creation has never been accomplished. If the fund had been properly created, but the subsequent steps of organization improperly or informally complied with, there might be a *de facto* organization, but in the case at hand the power of the council to create this fund has never been put in motion.

In conclusion, therefore, I am of the opinion that whatever may be the strict legal position of Mr. Johnson and other contributors to the fund, either by reason of their having contributed voluntarily under a mistake of fact or of law, the equities of the situation demand that the employes contributing should be paid back so far as possible all money they have heretofore contributed into the fund. This is only fair dealing for the reason that doubtless all the employes have been led by the action of the city officials and trustees of the fund to believe that the fund had a legal existence and on that assumption have contributed thereto.

Yours respectfully,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,
Corporation Counsel.

JUNE 29, 1911.

GEORGE WESTON, Esq., Representing City of Chicago, and
Assistant Chief Engineer, Board of Supervising En-
gineers, Chicago Traction, 105 South La Salle Street,
Chicago.

Dear Sir:

I have your communication of recent date wherein you state that certain questions have arisen in regard to the liability or non-liability of the contractor doing the construction work of the La Salle street tunnel to repair at his expense the sewers on La Salle street on either side of the tunnel that have been damaged as a result of the prosecution of the tunnel construction work.

The contract in question, a copy of which has been submitted to me with your communication (p. 1) for the reconstruction of the La Salle street tunnel between Randolph

street and Michigan street provides by Section 7, page 5, as follows:

“7. Maintaining and replacing, if disturbed, all sewers, water mains, pipes, cables, conduits, etc., to the satisfaction of the Commissioner of Public Works.”

Section 58, page 12, provides:

“All paving, curbs, gutters, sewers, etc., injured or destroyed shall be replaced, * * *.”

Section 73a, page 14, provides:

“The contractor will be required to take every precaution.”

Section 120, page 20, provides:

“All sidewalks, curbs, gutters, etc., injured or destroyed shall be fully repaired or replaced with the same class of material on the present site, or as shown on the drawing, to the satisfaction of the Commissioner of Public Works, at the unit price per square foot for sidewalk named in the proposal.”

Section 200, page 30, provides:

“The contractor shall conform to all the ordinances of the city of Chicago and the regulations imposed by said city * * *.”

Section 212, page 319, provides:

“The contractor agrees to pay all damages to persons or property * * *.”

Damage has been done to the sewers on each side of the tunnel in La Salle street between Randolph and Lake streets, and consequently the flow of sewage has been stopped from adjacent buildings to such sewers resulting in the flooding of basements of such adjacent buildings and in the creation of an obnoxious sanitary condition.

Having been requested to repair these sewers at their own expense, the contractors take the position that although it is probable that the condition of the sewers as above stated is due to their prosecution of the tunnel work, yet they are not liable for the repairs except upon the basis of extra compensation.

Their claim is not only unfounded in law, but exceedingly indefensible under the very terms of their contract. While all the sections hereinbefore quoted from the contract have reference to and keep plainly in view the proposition that the contractor shall be responsible for damage to sewers, Section

58, page 12, is peculiarly applicable to the situation and states as plainly as language can, that all sewers injured shall be fully repaired to the satisfaction of the Commissioner of Public Works and the entire expense of said work (of repair) should be included in the unit price per square yard named in the proposal for paving actually placed. The contract is explicit in its provisions with regard to damage to property within the street occasioned by the carelessness of the contractor (73a), and ample provision is also made in Section 7 that all sewers, if disturbed, shall be replaced to the satisfaction of the Commissioner of Public Works.

To hold that a contractor might damage city water and sewer pipes in the construction of an improvement to any extent he pleased with impunity and escape the financial burden of repairing the same under a contract as explicit upon that subject as is the present one, would be to establish a most dangerous precedent.

I am of the opinion that you should immediately notify the contractors in question that they will be held responsible for the damage in question, and also that they are required immediately to take steps to remedy the condition with respect to the backing up of sewage in buildings adjacent to the improvement, and further that they take immediate steps to repair said damage occasioned by the prosecution of the work.

Yours respectfully,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

CHICAGO, JULY 5th, 1911.

HON. FRANCIS D. CONNERY, City Clerk, Chicago.

Dear Sir:

Your request for an opinion on the proposed amendment to Section 2008 of the Municipal Code of Chicago of 1911, has been referred to me for answer. The Section as amended will read as follows:

“2008. CALLING OF WARES AND USING MECHANICAL

DEVICES FOR ADVERTISING GOODS PROHIBITED—EXCEPTION.) No person shall make or cause, permit or allow to be made any noise of any kind by crying, calling or shouting, or by means of any whistle, rattle, bell, gong, clapper, hammer, drum, horn, or similar mechanical device, for the purpose of advertising any goods, wares or merchandise, or of attracting the attention or inviting the patronage of any person to any business whatsoever; provided, however, that the provisions of this section shall not apply in amusement grounds, parks, halls, and other places duly licensed in accordance with the ordinances of the City of Chicago; and, *provided, further, that the provisions of this section shall not apply to duly licensed venders of goods, wares and merchandise while moving upon and along the streets and alleys of the city, between the hours of eight o'clock in the forenoon and four o'clock in the afternoon of each day, except on Sundays and holidays.*"

The present section of this ordinance, before its amendment was declared constitutional by the Supreme Court of this State, in the case of *Goodrich v. Busse et al.*, 247 Ill. 366. The power of the City Council to deal with this subject matter is conferred by Section 1, Article 5, Chapter 24, Hurd's Revised Statute, 1909, which provides, by the 20th Clause, that the City shall have the power "to regulate traffic and sales upon the streets, sidewalks and public places, * * *" and by the 41st Clause, giving the City the power "to license, tax, regulate, suppress and prohibit hawkers and peddlers and to revoke such license at pleasure."

The proposed amended section prohibits any person from making, causing or permitting to be made, any noise of any kind by crying, calling or shouting or by means of any whistle, rattle, bell, etc., for the purpose of advertising any goods, or of attracting the attention, or inviting the patronage of any person to any business, but allows, by the amendment, such noise to be made, and goods so to be advertised, by duly licensed venders of goods to do certain things, the doing of which other venders and persons not having a license are prohibited from. The right to sell goods by means of crying or noise making device is thus given to a certain class of venders, namely—those licensed, and is denied to all other persons in the community. The authority and power to restrain the mak-

ing of noise upon the streets is a police power to be exercised in the preservation of the health and general well being of the community. If it is a menace to the comfort and quiet of the citizens of Chicago to have persons and venders in general make an undue and unseemly noise in the advertisement of their wares, it can be no less an offense against the quiet of the City and its residents to have such noise made by duly licensed venders.

The amended section permits certain acts against public quiet to be made by one class of citizens and denies the right to others. This, in my mind, can not be done.

In the case of *Tughan v. the City of Chicago*, 78 Ill., page 405, it is said:

“Where power is conferred upon the legislative department of a municipal corporation to enact by-laws and ordinances for the better government of the inhabitants of the municipality, the body intrusted with that power, in its exercise, can not enact ordinances that are unreasonable, oppressive, or such as will create a monopoly; therefore, which would make an act done by one penal and impose no penalty for the same act done, under like circumstances, by another, could not be sanctioned or sustained, because it would be unjust and unreasonable. ‘Dillon on Municipal Corporations, Section 256.’ ”

To the same effect is the case of *City of Chicago v. Rumpff*, 45 Ill., page 90.

In the case of *City of Lake View v. Tate*, 130 Ill. 247, the City Council of appellant had passed an ordinance regulating the speed of trains, and allowed trains upon the line of railroad to be operated by a much higher rate of speed than those operated upon the other road passing through the City. In condemning this legislation the Court said:

“The law is well settled, however, that where the subject matter and provisions of a municipal ordinance are left to the discretion of the City Council, such discretion is not absolute, but is subject to the limitation that the ordinance must be reasonable.”

In the present instance, there does not seem to be any reasonable or rational excuse for permitting licensed venders of goods to make an unseemly and discomfoting noise upon the streets in selling their goods and denying such right of

action to all other persons in the community. Improper noise upon the streets is just as prejudicial to the comfort of the community, whether it be caused by a licensed or unlicensed peddler. If the welfare of the community requires the restriction of noise by persons vending goods upon the streets, it requires it as much in the case of one class of peddlers as in the case of others.

I am, therefore, of the opinion that the amendment to Section 2008, indicated by the underscored words in the section, is an invalid provision and, I am of the further opinion, that in order to escape the possibility of the amended portion rendering the whole ordinance invalid, that such portion should be eliminated before passage.

Yours very respectfully,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JULY 5, 1911.

MR. CHARLES TWIGG, Chairman, Committee on Gas, Oil & Electric Light.

Dear Sir:

Pursuant to a motion of the city council adopted at the meeting of June 26, 1911 (C. P., p. 615), we submit herewith our opinion as to the effect of the proposed ordinance regulating the maximum rates to be charged for gas for a period of six months upon any ordinance fixing rates passed at the expiration of said period. The ordinance is published at pages 615-616 of the current Council Proceedings and was introduced by Alderman Murray.

Section 1 of the ordinance for six months after it goes into effect restricts corporations, firms or persons supplying gas for illuminating or fuel purposes to a charge of 77¢ for each one thousand cubic feet of gas consumed if payment is made within ten days from the date that bills are rendered; otherwise, the charge may be 87¢ for the same amount of gas. The last proviso of section 1 requires that the City of Chicago

may only be charged 77¢ per one thousand cubic feet regardless of the date of payment by the city for the gas used.

Section 2 of the ordinance forbids the removal of gas meters without the consent of the consumers except under certain conditions.

Sections 1 and 3 require that the gas supplied shall be of not less than 22 candle power.

It will be observed that the proposed ordinance is a police and not a contract measure.

Section 1 of the ordinance is plainly invalid in that it discriminates in favor of the City of Chicago and against other consumers of gas. There is no basis in law for any such discrimination. The City of Chicago must stand on the same footing as any other consumer purchasing this commodity.

In our opinion an ordinance of the city council regulating rates should not deal with the question of meters or the quality of gas as is done in the proposed ordinance; such matters may well be dealt with in a separate ordinance.

The statute authorizing the City of Chicago to fix the maximum rate for gas has not been construed by the Supreme Court, and any such ordinance in our judgment should present no unnecessary points of attack by litigation.

The statute authorizes the fixing of maximum rates to be charged for gas for a period of not exceeding five years, so that the mere fixing of rates for a period of six months is not in itself a legal objection.

Yours very truly,

MACLAY HOYNE,

First Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,

Corporation Counsel.

JULY 6, 1911.

HON. JAMES DONAHOE, Chairman, Judiciary Committee.

Dear Sir:

In compliance with your request made through the City Clerk by letter of June 28, 1911, for an opinion concerning

the validity of an ordinance prohibiting the discharge or setting off of fire works, etc., and requiring a license to give any such exhibition, which ordinance is hereunto attached, we beg to advise you that we seriously question the legality of a portion of section 2 which reads as follows:

“If such application is so approved by the Chief of the Fire Department, and if in the opinion of the Mayor of the City of Chicago the person making such application has been shown to be properly qualified for the giving of such public display of fire works, the Mayor may issue a permit,” etc.

In the first instance, although the Mayor deems the applicant properly qualified, he may issue the permit but is not required to do so. In other words, the Mayor, by the terms of this ordinance, may issue a permit to A and deny it to B under substantially identical circumstances. Such provision, in our opinion, vests the Mayor with an arbitrary discretion which renders the ordinance unreasonable and therefore void.

In speaking on a similar subject, the court in *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9, at page 26, says:

“* * * The meaning of this provision is, that all traffic vehicles, except private wagons conveying families, are only forbidden the use of the boulevards in case their owners do not obtain the special permission of the board of trustees. In other words, the discretion is lodged with the board of trustees to permit or not to permit traffic vehicles to be used upon the boulevards in question. The ordinance, in so far as it invests the board of trustees with the discretion here indicated, is unreasonable.”

Again, the provision of the ordinance above referred to vests the Mayor with an arbitrary exercise of discretion by permitting him to determine without any limitations, qualifications or rules to guide him, whether the individual making the application is in each instance “properly qualified for the giving of such public display of fire works.” As will be observed, this permits the Mayor to fix one standard of qualification as to one and a different standard of qualification as to another applicant. Speaking on this subject in the case above referred to, the court at page 27 says:

“* * * It prohibits that which is, in itself and as a general thing, perfectly lawful, and leaves the power

of permitting or forbidding the use of traffic teams upon the boulevards to an unregulated official discretion, when the whole matter should be regulated by permanent local provisions operating generally and impartially. The ordinance is not general in its operation. It does not affect all citizens alike, who use traffic vehicles. It is only persons driving traffic vehicles upon the boulevards without the permission of the board of trustees, who are subjected to the penalties of the ordinance. The ordinance in no way regulates or controls the discretion vested thereby in the board. It prescribes no conditions, upon which the special permission of the board is to be granted. Thus, the board is clothed with the right to grant the privilege to some, and to deny it to others. Ordinances, which thus invest a city council or board of trustees with a discretion which is purely arbitrary, and which may be exercised in the interest of a favored few, are unreasonable and invalid. The ordinance should have established a rule by which its impartial enforcement could be secured."

We are, therefore, of the opinion that the ordinance should prescribe the qualifications which an applicant should possess and leave the Mayor to issue a permit or not, depending upon the possession by the applicant of the qualifications specified in the ordinance.

An ordinance drafted along similar lines was sustained by the Supreme Court in *Block v. City*, 239 Ill. 251.

The ordinance might be attacked for another reason: that the language to which we have already referred is an investment of the Mayor by the council with its legislative functions in that it permits the Mayor to unqualifiedly determine the qualifications of applicants for permits instead of defining the qualifications of applicants who should be entitled to a permit and leaving it to the Mayor to determine whether or not as a matter of fact the applicant possesses the qualifications specified by the council in the ordinance.

In *Union Bridge Co. v. United States*, 204 U. S. 364, it was held that Congress might invest the Secretary of War with authority to determine whether or not certain facts stated in the law in question, existed, although Congress could not delegate to the Secretary of War its legislative functions by permitting the Secretary of War to determine what facts he should pass upon the existence of.

For the reasons above indicated, we are of the opinion that the ordinance is not valid.

Yours very truly,

CHARLES M. HAFT,
Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,
Corporation Counsel.

JULY 7, 1911.

MR. HENRY A. ZENDER, President, Board of Examining Engineers.

Dear Sir:

The question of the right of the Board of Examining Engineers of the City of Chicago to control the engineers as to their licenses, etc., who are under the jurisdiction of the South Park Commissioners, brings up a number of questions.

The first question, in my opinion, is the authority and power of the South Park Commissioners as to whether it is a municipal corporation having all the powers that a municipal corporation would have. I find that what is known as the South Park Commissioners was created under an Act of the legislature passed February 24th, 1869, entitled: "An Act to provide for the location and maintenance of a park for the towns of South Chicago, Hyde Park and Lake."

The general laws relating to public parks, enacted subsequent to the Constitution in 1870, have been construed by the Supreme Court of the State of Illinois to apply to the South Park Commissioners as well as the West Chicago Park Commissioners. (*West Chicago Park Commissioners v. City of Chicago*, 152 Ill. 392.) In this case it was held after examination of the Charter of the West Chicago Park Commissioners and the various statutory provisions providing for the establishment of the Board of Park Commissioners, their duties and powers, that it was a municipal corporation.

Therefore, the South Park Commissioners is a corporation endowed with similar corporate functions derived from the same source to be exercised in exactly the same manner as the City of Chicago, and it has the same rank within its

own sphere, as if the two corporations were in different parts of the State of Illinois. The original Charter of the South Park Commissioners is found under Chapter 105, Section 172 of the Revised Statute of Illinois, and here the statute says that the Park Commissioners have power to:

“* * * pass all necessary ordinances, rules and regulations for the proper management and conduct of the business of said board of said corporation and for carrying into effect the objects for which said park commissioners is formed; they shall have full power to manage and control all officers and property of said district and of parks, boulevards and driveways maintained by said park district or committed to its care and custody.”

And Section 13 of the Act of 1869, creating the Board of South Park Commissioners provided among other things:

“The said board shall have full and exclusive power to govern, manage and direct said park; to lay out and regulate the same, to pass ordinances for the regulation and government thereof; and generally in regard to said park they shall possess all the powers and authority now conferred upon or possessed by the common council of the City of Chicago in respect to the public squares and places in said city.”

See also *West Chicago Park Commissioners v. Sweet*, 167 Ill., p. 326.

I beg to say that the City of Chicago prior to the passage of this Act creating the Board of South Park Commissioners, had full power to improve and control the public squares and places in Chicago and to adopt all needful rules and regulations for their management and use and the South Park Commissioners became possessed by the Act of the legislature creating them, of all the power and authority possessed by the city.

McCormick v. South Park Commissioners, 150 Ill. 516-522.

Wilson v. Sanitary District, 133 Ill. 443-465.

People ex rel. Wilson v. Salomon, 51 Ill. 37-50.

I, therefore, in accordance with the above decisions and the Act creating the South Park Commissioners, conclude that the South Park Commissioners has exactly the same power to regulate its employees within the limits of its boundaries

as the City of Chicago has to regulate and control, where public safety requires, anybody who works within the limits of the city. These engineers employed by the South Park Board are on the land of the South Park Commissioners, and therefore completely under the jurisdiction of the South Park Commissioners.

Therefore, the Board of Examining Engineers of the City of Chicago has no authority to compel the engineers employed by the South Park Commissioners to secure a license from the City of Chicago.

Respectfully,

HARRY J. GANEY,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JULY 7, 1911.

HON. JAMES DONAHOE, Alderman, 34th Ward.

Dear Sir:

In compliance with your request for an opinion concerning the validity of the above mentioned ordinance, we beg to advise you that we question the legality of said ordinance for the following reasons:

The first and second sections of this ordinance use the general terms, "retail" and "wholesale" without in any way defining what shall constitute a sale at retail, on the one hand, or a sale at wholesale, on the other.

Section 3 of the ordinance requires the applicant for a license to enter into certain agreements which in effect makes the ordinance contractual in form and does not subject the applicant to any penalty for a violation of such an agreement.

The statement or agreement cannot be considered as constituting a part of the ordinance inasmuch as the ordinance must in itself be complete without any reference to any extraneous documents.

Section 5 requires that the conditions under which such articles or any of them are to be offered or exposed for sale at wholesale shall be such as to provide the maximum of safety.

We doubt the power of the city to require that the conditions provide more than reasonable safety.

Section 6 provides that if the result of such investigation shall be satisfactory to the City Collector, etc., if authorized by the Mayor so to do, he shall issue a certificate showing that he has received the application, license fee and bond and that upon the presentation of this certificate the City Clerk shall issue a license.

The objection which we note to this provision is that it leaves it to the City Collector to determine in each instance, without any rules in the ordinance to guide him, whether or not the investigation has been satisfactory, and it also leaves it to the Mayor to authorize the Collector to issue the certificate or not as he may see fit, leaving it to the Mayor to authorize the issuance of the certificate to one person under **fixed** circumstances and to refuse to authorize the issuance of the certificate to another person under identical circumstances.

In speaking relative to this subject the court in *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9, at page 26, says:

“* * * The meaning of this provision is, that all traffic vehicles, except private wagons conveying families, are only forbidden the use of the boulevards in case their owners do not obtain the special permission of the board of trustees. In other words, the discretion is lodged with the board of trustees to permit or not to permit traffic vehicles to be used upon the boulevards in question. The ordinance, in so far as it invests the board of trustees with the discretion here indicated, is unreasonable. It prohibits that which is, in itself and as a general thing, perfectly lawful, and leaves the power of permitting or forbidding the use of traffic teams upon the boulevards to an unregulated official discretion, when the whole matter should be regulated by permanent local provisions operating generally and impartially. The ordinance is not general in its operation. It does not affect all citizens alike, who use traffic vehicles. It is only persons driving traffic vehicles upon the boulevards without the permission of the board of trustees, who are subjected to the penalties of the ordinance. The ordinance in no way regulates or controls the discretion vested thereby in the board. It prescribes no conditions, upon which the special permission of the board is to be granted.

Thus, the board is clothed with the right to grant the privilege to some, and to deny it to others. Ordinances, which thus invest a city council or a board of trustees with discretion which is purely arbitrary, and which may be exercised in the interest of a favored few, are unreasonable and invalid. The ordinance should have established a rule by which its impartial enforcement could be secured."

We are of the opinion that the objectionable features last above referred to might be eliminated if it were left to the Mayor or City Collector, or both of them, to determine whether or not certain fixed conditions exist and to issue the certificate accordingly.

Cases where the legislative branches of the Government have left to a ministerial officer authority to determine the existence of certain facts and to act accordingly are, *Block v. City*, 239 Ill. 251, and *Union Bridge Co. v. United States*, 204 U. S. 364.

Other sections of the ordinance in addition to those to which we have first invited attention use the general terms "wholesale" and "retail", but if those terms were defined in one instance the definition could be made to apply wherever those terms might occur in the ordinance.

The authority which must be relied upon to support this ordinance is Clause 65 of House Bill No. 324, passed by the Legislature at its recent session. This gives to the city authority "to regulate, restrain and prohibit the use of fire works, fire crackers, torpedoes, roman candles, sky rockets and other pyrotechnic displays." It is a serious question whether or not under this power the city is authorized to regulate the sale of fire works, in view of which we are of the opinion that it would probably be wise to limit the provisions of the ordinance to a regulation of the use of fire works.

For the reasons hereinbefore indicated, we are of the opinion that the ordinance in question is not valid.

Yours very truly,

CHAS. M. HAFT,
Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,
Corporation Counsel.

JULY 10, 1911.

TO THE HONORABLE THE CITY COUNCIL OF THE CITY OF CHICAGO.

Gentlemen :

Pursuant to an order of your Honorable Body directing the Corporation Counsel to report to the City Council what legislation is necessary to enable the City of Chicago to construct a system of subways, etc., we respectfully submit our opinion on the questions involved therein.

Said order is as follows:

“WHEREAS, Under the street railway ordinances passed February 11, 1907, the City of Chicago is now receiving an increasing annual revenue, already amounting to a sum in excess of \$1,500,000 a year; and

WHEREAS, This income is the result of an indirect tax paid to the city by those citizens who have occasion to use street railway transportation, and

WHEREAS, Such form of indirect taxation is abhorrent as a means of raising general municipal revenue, because the burden of such taxation is not cast upon the citizen in proportion to his means, but rather in proportion to his necessities, and

WHEREAS, Such contributions should properly be used for the purpose of extending and improving the transportation facilities furnished the citizens who make the contribution, and

WHEREAS, the next important step in working out the problem of an efficient local transportation system lies in the construction of an adequate system of subways designed and so located as to furnish through routes of travel to the different sections of the city and to be operated as a part of or in connection with the surface railway systems with a single fare and universal transfers, and

WHEREAS, Such a system of subways should be owned by the City of Chicago to the end that they may be controlled and operated solely in the interest of perfect transportation for its citizens, and

WHEREAS, The traction fund now received as a permanent income by the city, if capitalized at the prevailing rate of interest, would provide a fund sufficient to construct the subways now needed; therefore, be it

ORDERED, That the Corporation Counsel be and he is hereby directed to report to this Council what legislation is necessary to enable the City of Chicago

1st. To construct by day labor or by contract and to own a system of subways for the transportation of passengers and merchandise and to provide for such underground municipal utilities as may be desired and to operate or to lease the same.

2d. To issue bonds for the construction and equipment of such subways, said bonds to be a lien upon such property only and not to be included in the bonded debt of the city.

3d. To exclusively pledge and pay the traction fund as interest upon such bond issue, and to use any portion of such fund to aid in the creation of a sinking fund for the retirement of such bonds.

4th. To further use any net revenues received either from the operation or the leasing of such a system of subways, when constructed, for the purpose of paying off such bonds.

5th. To pay out of such bond issue the cost of such reconstruction of underground municipal utilities as are disturbed by the building of subways."

(Current Council Proceedings, page 117.)

I.

What legislation is necessary to enable the City of Chicago to construct by day labor or by contract and to own a system of subways for the transportation of passengers and merchandise and to provide for such underground municipal utilities as may be desired and to operate or to lease the same?

This inquiry in its concrete form contains a number of distinct legal propositions which may be formulated as follows:

(a) Has the City the general power, in the absence of further enabling legislation, to own and construct a system of subways for street railway transportation?

(b) Has the city power, without such legislation, to *construct* a system of subways for street railway transportation *by day labor*?

(c) Has the city power to construct such a system, if not by day labor, by contract?

(d) Has the city the power to construct and own a subway to be used for the transportation of *merchandise* as well as that of passengers?

(e) In the construction of such subway, has the city the power to provide space for the installation of underground municipal utilities other than street railways?

(f) Has the city power *to operate* a system of subways for local underground street railway transportation?

(g) Has the city the power *to lease* such system of subways?

(a) *Has the city the general power, in the absence of further enabling legislation, to own and construct a system of subways for street railway transportation?*

There was approved by the General Assembly on May 18, 1903 (in force July 1, 1903, Hurd's Revised Statutes of 1909, page 491) an Act to authorize cities to acquire, construct, own, operate and lease street railways and to provide the means therefor, which provides in part as follows:

"That every city of this State shall have the power to own, construct, acquire, purchase, maintain and operate street railways within its corporate limits, and to lease the same or any part of the same to any company incorporated under the laws of this State for the purpose of operating street railways for any period not longer than twenty years on such terms and conditions as the city council shall deem for the best interests of the public."

On January 18, 1906, and May 21, 1906, the City Council passed certain ordinances (Council Proceedings of January 18, 1906, page 2207, and Council Proceedings of May 21, 1906, page 442), providing the means for constructing a system of street railways and making provision for the printing and issuing of street railway certificates under said Act, to be issued by the City of Chicago to the amount of \$75,000,000. These certificates in various denominations from \$1,000 to \$10.00 each, were intended to be secured by a mortgage or deed of trust made by the City of Chicago (the form of which is set out in said ordinance of January 18, 1906) conveying to a trustee the whole of the street railways owned by the City of Chicago, or thereafter acquired by said city, all of its stations, cars, equipment, appurtenances, etc., franchises and property of all kinds, real and personal, held for use in connection with its street railways so far as such railways and property were acquired or should be acquired through the use of the certificates. The trust deed to be executed by the city to secure this indebtedness of \$75,000,000 provided that

it should, under no circumstances, be or become an obligation or a liability of the city or payable out of any general fund thereof, but solely payable out of that portion of the revenue or income derived from the said street railway properties, as specified in the trust deed. It was provided also by the terms of the trust deed, that in the event of a foreclosure by reason of any of the defaults in the performance of the provisions therein contained, there should be a sale of all property, both real and personal, and rights and franchises thereby mortgaged, and in such event the total of the property thereby mortgaged, both real and personal (exclusive of franchises and operating rights) should vest in the purchaser at such foreclosure sale, and that "the purchaser at such foreclosure sale, in addition thereto, shall have the right to construct, maintain and operate the said street railways, property, rights and franchises hereby mortgaged, during the period of twenty years from and after the date of such sale. * * *"

When the city was about to print and issue the certificates provided for in the ordinance, certain citizens and taxpayers filed a bill in chancery to restrain it and its officers from so doing. On hearing on bill and answer, the court sustained the validity of the certificates. On appeal to the Supreme Court, that court in *Lobdell v. City of Chicago*, 227 Ill. 218, reversed the decision of the Circuit Court and remanded the cause with directions to sustain the injunction as prayed in the bill.

In brief, the Supreme Court held that the issuance of such certificates by the city would be the incurring of an indebtedness in violation of the provisions of section 12 of article IX of the constitution of 1870, which reads in part as follows:

"No county, city, township, school district, or other municipal corporation, shall be allowed to become indebted in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes, previous to the incurring of such indebtedness;"

that this indebtedness was within the meaning of the constitutional inhibition (it being admitted by the city's de-

murrer that the city had so nearly exhausted its debt-creating power under the constitution, that if the certificates were held to be indebtednesses of the city, the issue of said certificates would increase the debt beyond the constitutional limitation and would consequently be violative thereof and void).

The principal contention (which we shall hereafter refer to more particularly) that the certificates increased the city's debt beyond the constitutional limitation, was advanced in the proposition that by the terms of the trust deed securing the certificates on the foreclosure of such trust deed, the sale would vest in the purchaser a license to operate the street railway system for a term of twenty years, and thus surrender and dispose of property rights of great value, which, were it not for the provisions of the ordinance, would be paid into the city treasury during the twenty year period as compensation for the use of the streets upon which street car lines were operated. This valuable property right (namely, the one to operate for twenty years), the court held, was a general asset of the city and that to attempt to dispose of it or pledge its surrender in the manner proposed was to

“entail upon the city not only the loss of the control of its streets for street railway purposes for twenty years, but would deprive it of many hundred thousands of dollars which would be paid into the treasury during that period by street railways as compensation for the use of its streets upon which to operate their street car lines.”

This, in a general and summary statement, comprises the attempts of the city heretofore to own, construct and provide for the means of purchase of a municipal street railway system, and the attitude of the court in relation to the proposed methods of purchase.

In the later case of *Barsaloux v. City of Chicago*, 245 Ill. 598, the question whether the city possessed the power under the language of the Mueller Act to construct and own a subway for a street railway system was considered by our Supreme Court. It was presented in this manner: Under the terms of ordinances granting certain rights to the Chicago Railways Company and the City Railway Company, passed February 11, 1907, by the City Council, and known as the “Traction Ordinances”, provision was made by Section 24

thereof for the making of certain deductions from the gross receipts derived from the operation of the two street railway systems, and that after such deductions, such receipts should be divided between the city and the companies on the basis of fifty-five per cent. to the city and forty-five per cent. to the companies; that subject to the action of the City Council, the city should deposit its portion of the net earnings of the street railway companies to the credit of the city in a separate fund, to be kept and used for the purchase and construction of street railways by said city.

Complainant Barsaloux filed a bill as a citizen and taxpayer in the Circuit Court to enjoin the city and its officials from incurring any expense in connection with preliminary subway work in accordance with the terms of the traction ordinances. At that time there had been accumulated in the traction fund from the fifty-five per cent. of the receipts of the railway companies about \$2,000,000, which fund was separate and apart from the other funds of the city. The city, at the time of the filing of the bill, had incurred certain expenses, and was about to incur others in preliminary investigations by expert engineers with reference to subways for accommodating street railway transportation. The bill charged that the city was entirely without power or authority, either to build or authorize the building of subways described in the traction ordinances, or to grant authority to any other corporation so to build such a subway, and that the payment of any of the traction fund for work in connection therewith, would be a misappropriation of public money. The court, after calling attention to the Act of 1903, hereinbefore referred to and generally known as the "Mueller Law," states, that under that Act as it was involved in the case at bar (p. 605)

"the only question that can arise is whether the term 'street railways' may be held to include underground street railways."

The court decided this question in the affirmative on the authority of the following cases:

Doane v. Lake Street Elevated Railroad Co., 165 Ill. 510.

Bond v. Pennsylvania Co., 171 Ill. 508.

Lieberman v. Chicago Rapid Transit Railroad Co.,
141 Ill. 140.

In re New York District Railway Co., 107 N. Y. 42.

The language in the latter case holding that street railways include underground railways, is quoted with approval in a dictum of Chief Justice Fuller in the case of *Underground Railroad v. City of New York*, 193 U. S. 426, 428.

It was similarly held in the case of *Peoples' Rapid Transit Company*, 125 N. Y. 93, 97.

We consider the question settled beyond peradventure by the Supreme Court decision of the *Barsaloux* case. There can be no further doubt of the city's right under the *Mueller* law to build subways.

(b) *Has the city power, without further legislation, to construct a system of subways for street railway transportation by day labor?*

Section 50 of Article IX of the general incorporation act for cities and villages enacted April 10, 1872 (*Hurd's Rev. Stat.* 1909, p. 357) reads as follows:

"All contracts for the making of any public improvement, to be made for in full or in part by a special assessment, and any work or other public improvement, when the expense thereof shall exceed Five Hundred Dollars shall be let to the lowest responsible bidder in the manner prescribed by ordinance—such contract to be approved by the mayor or president of the board of trustees: *Provided, however*, any such contract may be entered into by the proper officer without advertising for bids, and after such approval by a vote of two-thirds of all the aldermen or trustees elected. * * *

Our Supreme Court passed on this section of the Act in the case of *City of Chicago v. Hanreddy*, 211 Ill. 24. The facts in that case are substantially as follows:

The city had forfeited a contract awarded after public competitive bidding for the construction of Section D of the Lawrence avenue main conduit, or intercepting sewer. After advertising for and receiving the bids of Hanreddy and others for the construction of the uncompleted portion of said work, the Commissioner of Public Works decided that the work could be done by the city by day labor more cheaply than the bids

indicated it could be performed under contract. On the recommendation of that official, the City Council passed an ordinance directing that said Section D be finished by day labor by workmen employed under the provisions of the Civil Service Act. Hanreddy's bid having been rejected, he immediately filed his bill praying for an injunction to restrain the city from completing the work by day labor relying on the provisions of said Section 50 above quoted. The city claimed that said section applied only to improvements the cost of which was to be paid for by money raised by special assessment, and not to the construction of other public work.

The Supreme Court in denying the city's position said:

"The provision is general, and the language, 'any work or other public improvement,' must be held to include all work or other public improvement, whether the same is to be paid for from funds raised by special assessment, general taxation or other public funds, as in this case from the water fund."

* * * * *

"No discretion is thereby conferred upon the city or any of its officers as to whether the work or improvement shall be constructed under the contract or by day labor, but it is clear if the work or other public improvements will exceed in cost the sum of \$500 it must be let to the lowest responsible bidder after advertising for bids."

The proviso in said Section 50 allowing a city official to make a contract without advertising for bids, if sanctioned by a two-thirds vote of the council, the court held was

"doubtless passed to enable cities and villages to make contracts for public improvements without advertising for bids and without the approval of the mayor or president of the board of trustees in cases of emergency, and the powers therein contained are broad enough to authorize them to pay for the improvement as the work progresses.

* * * The fact that the emergency might not be of so serious a character as to induce the requisite number of aldermen or trustees to vote to authorize a contract to be made for a public improvement without advertising for bids or without the approval of the mayor or president of the board of trustees, and to pay for the improvement as the work progressed, would be no sufficient reason to authorize the courts to hold that such municipalities had the right to make contracts not only not author-

ized by the statute, but by the express provisions of the statute prohibited.”

It is apparent that on the authority of the Hanreddy case if the Legislature had not passed the necessary legislation enabling the City to construct public improvements by day labor, the City would have been without such power. The statute, however, conferring this power, was passed by the last Legislature and became a law on July 1, 1911.

(c) *Has the city power to construct such a system if not by day labor by contract?*

We have heretofore pointed out in the consideration of the questions arising under sub-head (a) that the city has the present power to construct a system of subways for local transportation. We have also announced it as our opinion after a consideration of the questions involved in sub-head (b), that such construction of a system of subways cannot be accomplished by day labor, or by any other means than that pointed out in Section 50, of Article IX of Chapter 24 of the Illinois Statutes in the absence of the necessary enabling legislation; but as heretofore stated such legislation has been enacted.

(d) *Has the city the power to construct and own a subway to be used for the transportation of merchandise as well as that of passengers?*

The Mueller Law grants to the municipality the right “to own, construct, acquire, purchase, maintain and operate street railways within its corporate limits.” At the threshold of the consideration of this question we are met with the doctrine that powers granted the municipality will be strictly construed. The exact meaning of the term “street railway” has received frequent judicial comment by the reviewing courts and text writers and it has been decided by the Supreme Court of Illinois that a railroad or railway which carries merchandise is not a street railway, because it is used for purposes other than transporting passengers, and also, that the distinctive and essential feature of a street railway considered in relation to other railroads, is that it is a railway for the transportation of passengers and not of freight. (Elliott on Roads and Streets, 2d ed., sec. 733.)

If by reason of carrying merchandise the proposed system of street railways thereby becomes a "commercial railroad" instead of a "street railroad", by such change in its character it must be held to be an additional burden upon the fee held in the land.

This rule, though opposed by decisions in some states, has been approved in Illinois in the following cases:

In *Wilder v. Aurora, etc., Traction Co.*, 216 Ill. 493, a property owner brought a bill to enjoin the Aurora etc. Traction Co. from laying down its railway tracks upon the street in front of his property claiming to be the owner in fee of the street in front of his lot to the center line of the street, which fee was subject to a right of easement in the public. After discussion of the character of the ownership of complainant in the lot and portion of the street in front of his premises, the court held that he was the owner in fee of half of the street in front of his lot, and proceeded to the further contention on his part that an ordinance authorizing certain individuals to construct and maintain a railroad in the street in front of his premises was void, and held that a grant to individuals to operate a street railway franchise is invalid, and also held, as a matter of fact, that the road in question was a commercial railroad as contra-distinguished from a street railroad. The following language is used:

"There has been a general concurrence, however, in embracing all railroads in two divisions or classes: (1) commercial railroads, and (2) street railroads. Commercial railroads embrace all railroads for general freight and passenger traffic between one town and another or between one place and another. So far they have not been successfully operated, to any extent at least, except by steam. They are usually not constructed upon the public streets or highways except for short distances. Street railroads embrace all such as are constructed and operated in the public streets for the purpose of conveying passengers with their ordinary hand luggage from one point to another on the street. * * * The appellee road is evidently not to be constructed for the purpose of conveying passengers with their ordinary hand luggage from one place to another. * * * 'A street railroad, as is well understood, is a road constructed on a street or highway for the purpose of conveying passengers,

living upon or having business on such street or highway, its main object being to accommodate street travel.' In *Hartshorn v. Illinois Valley Traction Co.*, 210 Ill. 609, we said that street railways are railways on or upon streets of a city or town, and that a street railway may not, like a steam railway, locate its route in order to reduce time and distance for passengers traveling from town to town across the country, and that, as such location of its route is not for the accommodation of local travel on highways or streets, it therefore 'involves a perversion of the character and objects of street railways.' A railway, authorized to carry freight as well as passengers, becomes a commercial railroad, instead of a street railroad, and such railroad, when laid in a street becomes an additional burden on the fee, and cannot be laid without the consent of, or compensation made to, the adjoining property owners. (*Linden Land Co. v. Milwaukee Railway Co.*, 107 Wis. 493, 511.)

In the case above quoted, the authorities upon the question are fully collated and analyzed, the court concluding that the rule that the road being a commercial railroad it constituted a new and additional servitude upon the property owner abutting upon the street.

The following cases similarly hold:

City of Aurora v. Elgin, Aurora & Southern Traction Co., 227 Ill. 485, 496.

Harvey v. Aurora, De Kalb & Rockford Elec. Traction Co., 174 Ill. 295.

Spalding v. M. & W. Ill. Ry. Co., 225 Ill. 585.

Hartshorn v. Illinois Valley Traction Co., 210 Ill. 609.

Bond v. Pennsylvania Co., 171 Ill. 508.

Gillette v. Aurora Railways Co., 228 Ill. 261, 273.

If, therefore, the system in question is a system authorized to carry merchandise, it must, under the holding of the Wilder and other cases, be considered a commercial railroad, and if a commercial railroad, there is the gravest doubt as to whether a commercial railroad is authorized to be built under the terms of the Mueller Act. In view of this doubt, we must resolve the question against the power and deny it. It follows, therefore, that the city is without power to own, construct, or maintain a railway system for the transportation of merchandise.

A further question arises in this connection, and that is that the city, as to some of its streets, owns a fee subject to the right of user by the public—as to other streets, the fee remains in the abutting lot owners.

Sears, etc., v. City of Chicago, 247 Ill. 204.

Even if it should be held the grant of power of the Mueller Law also carried the power to operate commercial railroads, it would be necessary in many instances to first condemn the rights of the various property owners abutting on those streets in which the city has only an easement before commercial railroads could be operated. In those streets, however, where the city owns the fee, condemnation proceedings would not be necessary.

It has been held in the case of *Sears v. City of Chicago*, *supra*, that the School Section Addition to Chicago, being all that territory included between the north side of Twelfth street and the south side of Madison street and the east side of Halsted street to the west side of State street, is a common law dedication district in which the fee remains in the abutting property owners.

In reaching the conclusion that the subways could not be used for the transportation of merchandise, we have not overlooked the following provision in the Mueller Act (Hurd's Rev. Stat. 1909, page 492) :

“Street railways owned and operated by any such city, or owned by the city and leased for operating purposes to a private company, may carry passengers and their ordinary baggage, parcels, packages and United States mail, and may be utilized for such other purposes as the city council of such city may deem proper.”

In our opinion the precise meaning of this provision is doubtful and difficult to ascertain. The clause providing that street railways “may be utilized for such other purposes as the city council of such city may deem proper” on one construction, might be construed to mean that the council could use or lease such railways for any purpose whatever, including the transportation of merchandise. Interpreted in another way, however, it might be held to intend only such uses for which street passenger railways may ordinarily be put to; and on this construction, since the Supreme Court of

Illinois has expressly drawn a distinction between street railways for passenger and commercial railways, which we have above pointed out, the use of street railways for the purpose of transportation of merchandise would not, of course, be one of the ordinary uses of street railways for passengers. The distinction between the two classes of railways drawn by the Supreme Court constitutes a rule of law which must be recognized and must prevail unless it has been clearly abrogated by the provision in the Mueller Act, which we have quoted.

The question, therefore, presented is whether the general clause providing that the street railways "may be utilized for such other purposes as the city council of such city may deem proper" was intended to repeal the distinction which the Supreme Court has established between street railways for passengers and commercial railways, and to grant the power to the city council to authorize street railways to be used for the transportation of merchandise. If the rule of law announced by the Supreme Court has been abrogated by the clause in question in the Mueller Act, it is effected by implication alone, for the provision nowhere expressly grants the power in terms to use street railways for the transportation of merchandise.

In our opinion we do not think that the legislature intended by said clause to abrogate by implication the rule of law announced by the Supreme Court creating the distinction between street railways for passengers and commercial railways. It will be noted that the provision of the statute uses the term "street railways" and as the Supreme Court has defined "street railways" to mean local street railways for the transportation of passengers, the legislature must be presumed to have enacted the provision with the rule of law of the Supreme Court in mind and to have used the term "street railways" according to the meaning given to it by the court. If the legislature had intended that the term "street railways" should include commercial railways, undoubtedly it would have expressed its intention in clear and unambiguous terms.

We are of the opinion, therefore, that the clause providing that street railways "may be utilized for such other

purposes as the city council of such city may deem proper'', does not grant the power to use street railways for the transportation of merchandise, but merely intends street railways to be used "for such other purposes" as are ordinarily included in the operation of street railway for the local transportation of passengers. We are further strengthened in this conclusion by the rule of statutory construction that where grants of power are given to municipal or other corporations and such grants are ambiguous and uncertain, the doubt must be resolved against the exercise of the power.

1 Abbott on Municipal Corporations, Sec. 113, p. 200.

In the well known case of *Blair v. City of Chicago*, 201 U. S. 400 (50 Law Ed. 801), on page 831, it is said with reference to the construction of certain legislative acts which were claimed by the railroad companies to contain grants to them of track rights over the streets of Chicago for ninety-nine years:

" 'Words of equivocal import,' said Mr. Chief Justice Black, in *Pennsylvania R. Co. v. Canal Comrs.*, 21 Pa. 9, 22, 'are so easily inserted by mistake or fraud that every consideration of justice and policy requires that they should be treated as nugatory when they do find their way into the enactments of the legislature.' 'The just presumption,' said Cooley, in his work on Constitutional Limitations, 7th Ed., p. 565, 'in every such case is, that the state has granted in express terms all that it designed to grant at all,' and, after quoting from the Supreme Court of Pennsylvania to the same effect, the learned author observes: 'This is sound doctrine and should be vigilantly observed and enforced.' "

* * * * *

"In the case of *The Binghamton Bridge (Chenango Bridge Co. v. Binghamton Co.)*, 3 Wall. 51, 75, 18 L. Ed. 137, 143, it was said: 'The principle is this: That all rights which are asserted against the state must be clearly defined and not raised by inference or presumption; and if the charter is silent about a power, it does not exist. If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the state; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the state.'

This principle has been declared axiomatic as a doctrine of this court. *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 666, 24 L. Ed. 1036, 1038. In *Slidell v. Brandjeau*, 111 U. S. 412, 438, 28 L. Ed. 321, 330, 4 Sup. Ct. Rep. 475, it is declared as wise doctrine; 'It serves to defeat any purpose concealed by the skillful use of terms to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies.' Among other cases affirming the principle in this court is *Coosaw Mining Co. v. South Carolina*, 144 U. S. 550, 36 L. Ed. 537, 12 Sup. Ct. Rep. 689, in which it was applied in adopting, of two doubtful constructions, the one more favorable to the state. * * * So enormous a grant of privileges, including an exclusion from some streets of any railway system, ought not to be presumed or held to be conferred in doubtful and ambiguous words. Grants of this character are not to be destroyed by an unreasonable or narrow interpretation. But if ambiguity is fatal to such claim of rights as against the public, for the stronger reason must such grants of far-reaching and exclusive privileges as are here asserted fail when they can only be maintained by strained construction in their favor.'

To the same effect are:

Detroit Citizens' Street R. Co. v. Detroit, 171 U. S. 48; 43 L. ed. 167, 18 Sup. Ct. Rep. 732;

Freeport Water Co. v. Freeport, 180 U. S. 587; 45 L. ed. 679; 21 Sup. Ct. Rep. 493;

Chicago Terminal Transfer R. Co. v. Chicago, 203 Ill. 576.

(e) *In the construction of such subway, has the city the power to provide space for the installation of underground municipal utilities other than street railways?*

In considering the proposition as above stated it may be well at the outset to distinguish between those utilities now owned and operated by the city, such as water mains, sewers and electrical wires and conduits, and those utilities owned and operated not by the city, but by quasi-public agencies. As to the former an expeditious and economical method of readjustment by the city will be necessary and we think incident to the work of construction of the subway. Consequently as to those utilities now owned and operated by the city it undoubtedly has the power to provide for their accommoda-

tion in the subway. In this connection it may be said that the city is not under obligation to provide merely for its immediate needs with respect to the space required for these utilities, but may build galleries or other means for their accommodation with a view to the space required by such utilities in the future. This position is supported not only by decisions in this, but in other states.

In *Rector v. Hartford Deposit Co.*, 190 Ill. 380, the appellant advanced as a defense for its non-payment of rent that the office building of appellee had been constructed on a much larger scale than its business required and contained many rooms intended to be rented to others for offices, and that in so doing it exceeded its corporate powers, namely, those connected with the safe deposit business. The court said:

“In *People v. Pullman Palace Car Co.*, 175 Ill. 125; speaking with reference to the power of a corporation to erect a building for its own purposes, we said (p. 139): ‘The right of the appellee to construct an office building is indisputable, as so, also, is the right to select the most eligible and desirable site. It would be but a narrow and wholly unjustifiable view of this power to insist that in planning and constructing the building the corporation should leave out of consideration its probable prospective requirements, and should erect a building containing only as many rooms and offices as its present business might demand. The corporation had the right, as we think, to look to and prepare for the future. It was but true economy to do so, and if it proceeded in good faith, * * * no reason is perceived why it should be deemed bound by law to permit such parts of the building as are not for the present required for the accommodation of its business to remain vacant, but, on the contrary, that it might lawfully obtain such income from the rents of such rooms as might be possible until the growth or increase of its business demanded the additional rooms or offices.’ * * *

In planning and constructing such a building, as was said in *People v. Pullman Palace Car Co.*, *supra*, the corporation should not necessarily be restricted to a building containing the precise number of rooms its then business might require, and no more, but that the future probable growth and volume of its business might be considered and anticipated, and a larger building, and one containing more rooms than the present volume of

business required, be erected and the rooms not needed might be rented by the corporation,—provided, of course, such course should be taken in good faith, and not as a mere evasion of the public law and the policy of the State relative to the ownership of real estate by corporations.”

In *Worden v. New Bedford*, 131 Mass. 23, it was held that a municipality could not erect buildings for a speculative purpose, but having built a city hall in good faith, it has the right to allow it to be used in good faith incidentally for other purposes.

In *Jones v. Sanford*, 66 Me. 585, it was expressly held that the “wants of the future as well as of the present are to be considered” in constructing a public improvement.

In *French v. Quincy*, 3 Allen (85 Mass.), 9, it was held that a town may erect a city hall of sufficient capacity for all the business which it may have occasion to do in such building, but may also, in its erection, make suitable provision for its prospective wants.

In *Greenbanks v. Boutwell*, 43 Vt. 207, it was held that “in the building of a school house to serve present needs, it is entirely proper for the district to have a wise and prudent forecast as to its prospective needs; and in serving present needs, it would be proper to go beyond the immediate necessity, and make reasonable provision for what the district seems likely soon to need for the service and accommodation of the increasing population and scholars. Common prudence and the obvious dictates of economy may often require this.”

In *Bates v. Bassett*, 50 Vt. 530, it was expressly held that in constructing a public building, a municipality should anticipate the prospective needs of the town.

It follows from the authorities above cited that the city in building a subway is not limited to the actual present physical necessities of street car traffic or the necessities for the present accommodation of its own utilities, but may build a subway of sufficient size to accommodate not only the future street railway needs, but also the future needs for space for the accommodation of its own utilities.

As to the further question of whether if the subways are constructed of a size more than sufficient for the present

needs, it may utilize such extra space by allowing utilities owned by others than itself to be installed therein, upon a consideration of the authorities, we must answer this in the affirmative.

Rector v. Hartford Deposit Co., supra.

People v. Pullman Palace Car Co., supra.

In the case of *City of New York v. Interborough Rapid Transit Co.*, 125 N. Y. App. Div. 443 (affirmed in 194 N. Y. 528) it was held that a municipality had the right to use a subway constructed primarily for street railway transportation for any other purpose, provided the use to which it is put does not interfere with the primary object.

In *Bell v. City of Platteville*, 71 Wis. 139, it was held that a municipality had power to rent its city hall for the purpose of theaters and general entertainments where these incidental uses did not conflict with the primary use of the hall.

In *Jones v. Sanford*, 66 Me. 585, it was held that a municipality did not exceed its powers by making a contract to allow a dramatic company to use its town house for a period of six years when not wanted for town purposes, in consideration for money to be expended by said company for enlarging the building and putting upon it necessary repairs.

In the case of *Stone v. Oconomowoc*, 71 Wis. 155, it was held that the auditorium of the city hall might be used for theatrical and other entertainments where the primary object in building the city hall was municipal.

In *Spaulding v. Lowell*, 23 Pic. 71 (40 Mass.), it was held that where a municipality built a market house two stories high, of which only the lower story was used for a market and the upper story was appropriated to other subordinate purposes, there was not such an excess of authority as to render the erection of the building illegal. The court said:

“As to the size and other circumstances of the building, if the accomplishment of the object was within the scope of the corporate powers of the town, the corporation itself was the proper judge of the fitness of the building for its objects.”

In *French v. Quincy*, 3 Allen 9 (85 Mass.), it was held

that if a city hall contained rooms not wanted for the time being for municipal business, the municipality might let them temporarily or allow them to be used gratuitously, and the condition of a deed of land to the inhabitants of a town, which provides that the same "shall not be used for any other purpose than as a place for a town house for said inhabitants" is not thereby broken.

In the case of *Jacksonville v. Ledwith*, 26 Fla. 163, it was held that

"If the real and principal object is the building of a market house, the appropriation of a portion of the building to other purposes, as for the holding of courts, does not render the erection of the building illegal and the same rule will hold good where in the case before us the premises are leased."

In *Bates v. Bassett*, 60 Vt. 530, it was held that a municipality may rent a part of a building constructed for municipal business; that although a municipality has not the right as a primary purpose to erect buildings to rent, yet if in the erection of its hall for its proper municipal uses, it conceives that it will lighten its burdens to rent part of its building whereby an income is gained, no sound reason is suggested why it may not do so.

In *Port Huron v. McCall*, 46 Mich. 565, Judge Cooley, speaking for the court, announces this principle (page 574):

"There is a principle of law that municipal powers are to be strictly interpreted, and it is a just and wise rule that municipalities are to take nothing from the general sovereignty, except what is expressly granted, but when a power is conferred, which in its exercise, concerns only the municipality, and can wrong or injure no one, there is not the slightest reason for any strict or literal interpretation with a view to narrowing its construction."

It must not be inferred from what has been above said that we are of the opinion that the cost of readjusting or replacing the utilities not owned by the city must be borne by it. On the contrary, the authorities clearly lay down the proposition that when a city makes a different use of a street or public place other than that which it has theretofore been put to, and in consequence thereof utilities placed therein are dis-

turbed or disarranged, the cost of adapting such utilities to the new use of the street must be borne by those owning utilities and not by the city.

The principle underlying the rule requiring the owners of quasi-public utilities to bear the burden or cost of readjusting them to any change or additional use of a street, is that the use of the streets by such utilities is a secondary or subordinate one to that for which the streets are primarily to be used; and that this use by such utilities is allowed by reason of the necessities of urban conditions.

3 Abbott on Municipal Corporations, Sec. 886.

This power to control the use of streets is expressly given to the city in the seventh clause of Article V, Chapter 24, of the Cities and Villages Act:

“To lay out, to establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds, and vacate the same.”

And by the ninth clause:

“To regulate the use of the same.”

And by the thirteenth clause:

“To regulate the openings therein for the laying of gas or water mains and pipes, and the building and repairing of sewers, tunnels and drains, and erecting gas lights.”

And by the fourteenth clause:

“To regulate the use of sidewalks and all structures thereunder. * * *”

This view is upheld in *Kirby v. Citizens' Ry. Co.*, 48 Md. 168, wherein the court held that the easement acquired by the railway company under its charter was subject to the paramount right of the city (the power to construct sewers being expressly conferred upon the city) and in constructing its railway the appellee knew or was bound to know that its use of the bed of the street for railway purposes, was liable at any time to be interfered with whenever the city authorities might deem it necessary for the public welfare.

In the case of *New Orleans Gas Light Co. v. Drainage Comm'n.*, 111 La. 838, the question involved was whether the

City of New Orleans or the Gas Company should bear the cost of changing the location of the gas mains which was rendered necessary by the construction of sewers by the city. The court held that it was the duty of the gas company to bear such cost. In reaching its conclusion the court said that in requiring the change of location of the gas mains the municipality was simply exercising the reserved right subject to which the gas company was allowed to make use of the street; and the court further held that the right of use of the street by the gas company did not rise to the dignity of a servitude established in its favor, but at best it was merely a license subject to modifications as the public necessities or convenience might require.

In *Kansas City v. Morley*, 45 Mo. App. 304, in the construction of a sewer which ran under railroad tracks, the question whether the city or the railroad should bear the cost of shoring up the tracks was presented, and the court held that this cost should be borne by the railroad company on the ground that the grant of a right of way to a railroad company to lay its road along a street of a city is subject to the paramount right of a city to improve the street, which right is continuous and one that the city could not barter away.

In *re Deering*, 93 N. Y. 361, it was held that an order reducing an assessment for regulating, grading, etc., a street in the City of New York by striking out an item for expense incurred by a gas company in removing and replacing its pipes was proper, the court saying (p. 362):

“For aught that appears here, although authorized to lay its pipes through the public streets * * * the company took the risk of their location and should be required to make such changes as public convenience or security requires and at its own cost and charge.”

In the case of *Roanoke Gas Co. v. City of Roanoke*, 88 Va. 810, it was held that while the city allowed a company to lay gas or water pipes in its streets, the company accepts the privilege subject to the city's right to change the grades of its streets, and with the probability that the right would be exercised; that the city may afterwards lower the grade and if in so doing the pipes become exposed and obstructive it may

require the company to remove them or have it done by its own agents.

The following cases similarly hold in principle:

Chicago & Northwestern Ry. Co. v. City of Chicago,
140 Ill. 309;

Natick Gas Light Co. v. Natick, 175 Mass. 246, 248;

Jamaica Pond Aq. Co. v. Brookline, 121 Mass. 5;

Gas Light & Coke Co. v. Columbus, 50 Ohio St. 65;

Chicago Burlington R. R. Co. v. Chicago, 166 U. S. 226;

Ashland Street Ry. Co. v. Ashland, 78 Wis. 271;

Rockland Water Co. v. Rockland, 83 Me. 267;

Louisville Street R. R. Co. v. Louisville, 71 Ky. 415;

Anderson v. Fuller, 51 Fla. 380;

City of San Antonio v. San Antonio Ry. Co., 15 Tex.
Civ. App. 1.

(f) *Has the city power to operate a system of subways for local underground street railway transportation?*

The Mueller Law, to which reference has been hereinbefore previously made, provides in part by Section 1, that:

“No city shall proceed to operate street railways, unless the proposition to operate shall first have been submitted to the electors of such city as a separate proposition and approved by three-fifths of those voting thereon.”

The proposition to operate street railways in the City of Chicago was submitted to the electors of the city on April 3rd, 1906, and was defeated. (*Lobdell v. City*, 227 Ill. 218.) Until a majority of the electors of the city have signified by their votes their approval of such municipal operation of street railways, we are of the opinion that such system can not be operated by the city under the existing law.

(g) *Has the city the power to lease the system of subways?*

Section 1 of the Mueller Law provides that the city shall have the power to own, construct, etc., street railways within its corporate limits and

“to lease the same, or any part of the same to any company incorporated under the laws of this state for the purpose of operating street railways for a period of not longer than twenty years, on such terms and conditions

that the city council shall deem for the best interests of the public.”

The section of the statute above quoted expressly gives the city the power to lease the subway to railways incorporated under the laws of the state for the purpose of operating street railways. It will be observed that by the terms of the grant to lease the subway, the power is limited expressly to leasing for street railway purposes.

Lobdell v. City of Chicago, 227 Ill. 218.

We are of the opinion, therefore, that the subways as a whole could not be leased for any other purpose than the primary one of street railways. It may be that the subways could be leased for other purposes provided that such purposes do not in any way conflict with or prevent the exercise to the fullest extent of the primary object of the operation of street railways.

II.

HAS THE CITY THE POWER TO ISSUE BONDS FOR THE CONSTRUCTION AND EQUIPMENT OF SUCH SUBWAYS, SAID BONDS TO BE A LIEN UPON SUCH PROPERTY ONLY AND NOT TO BE INCLUDED IN THE BONDED DEBT OF THE CITY?

In the leading case upon this question (*Lobdell v. City*), heretofore referred to, the city claimed that the bonds contemplated by the issuance of the mortgage were not general city indebtedness, but were merely the pledging of specific street railroad properties for the payment of the certificates. The court held that this was not the case, however, and that, in addition to specific street railroad properties, to which recourse was confined in case of foreclosure by the bondholders, valuable twenty year track rights were also pledged and that the entire scheme constituted a pledging of general municipal assets, consequently incurring an indebtedness beyond and in excess of the constitutional limitation. It is said, however, in that decision:

“If all that is proposed to be done in this case is to pledge the property, and its income, which is purchased with the proceeds of said street railway certificates when issued and sold to secure the payment of said

certificates, then, under the doctrine of *Winston v. Spokane*, 41 Pac. Rep. 888, which has been approved in *City of Joliet v. Alexander* and *Village of East Moline v. Pope*, *supra*, there would be no indebtedness, within the constitutional inhibition, created by the issue and sale of said street railway certificates and the execution of said trust deed or mortgage, as against the city. * * *

"In the Pope case * * * the court said, 'In the case at bar it is manifest that if nothing but the income from the waterworks was pledged or could be reached to satisfy the principal and interest of the bonds the case would be within the meaning of the language last quoted (the language of the Alexander case).'"

In summarizing the Lobdell case, we think it clear that had merely the physical property constituting the street railway system and the income derived therefrom been pledged, it would have been a purchase money mortgage, such as is expressly held not to be prohibited on the part of the city to make, but that the additional security in the shape of a twenty year franchise to be conveyed to the purchaser at foreclosure included property other than that covered by a purchase money mortgage, namely, general city property.

We see no reason, however, under the doctrine of the Lobdell, Pope and Alexander cases (the latter approved in *Evans v. Holman*, 244 Ill. 596), why a strict purchase money mortgage limited in terms to the security afforded by the subway itself and the income derived therefrom, could not be affected so far as the legality of the proceeding is concerned. The practicability of the marketing of such a debenture upon the security which would be behind it, is, in our opinion, extremely doubtful.

In *Winston v. City of Spokane*, 41 Pac. Rep. 888, 12 Wash. 524 (cited by our Supreme Court in the Lobdell case, *supra*), the City of Spokane attempted to build a system of waterworks and made the bonds payable out of the waterworks fund. It was already indebted to the amount limited by the constitution and the question before the court was whether the bonds created an additional indebtedness against the city. After stating the facts, the court said:

" 'This being so, we are of the opinion that neither the ordinance, the contract, nor the obligations to be is-

sued by the city in pursuance thereof, do or will constitute a debt of the city within the constitutional definition. The only obligation assumed on the part of the city is to pay out of the special fund, and it is in no manner otherwise liable to the beneficiary under the contract. The general credit of the city is in no manner pledged, except for the performance of its duty in the creation of such special fund. The transaction, therefore, is no more the incurring of an indebtedness on the part of the city than is the issue of warrants payable out of a special fund created by an assessment upon the property to be benefited by a local improvement.' ”

We assume that any bonds to be issued to pay for the construction and equipment of subways would state on their face, that they are secured by a mortgage upon the subway system and revenues derived therefrom. The general credit of the city would not thus be pledged for the redemption of these bonds. The only security which the bondholders would have for their payment would be the subway itself and its revenues. A different situation would be presented if the city sought to pledge funds to be derived from the dramshop licenses, or licenses from hackmen or peddlers, theaters or amusements, or other revenue of the city not in existence at the time. This would undoubtedly create an indebtedness prohibited by the constitution; but in view of the fact that the method proposed will attempt only to incumber the property which is to be paid for to the extent of the physical value of such property and to the extent of the income derived from the operation of the property itself or its rental, it is not an attempt to increase the indebtedness prohibited by the constitution. As was said in the case of *Winston v. City of Spokane, supra.*,

“The general credit of the city is in no manner pledged, except for the performance of its duty in the creation of such special fund.”

The proposition may be explained by the following illustration: If a person undertakes to build a house and to secure the funds for so doing borrows money and makes provision for its payment, giving as security a mortgage in the nature of a purchase money mortgage upon the house and its rental and limited in its terms to the house and such rental, he in no wise increases his indebtedness or depletes or breaks in upon

his then present capital. In the event that he does not repay his debt, the house is taken by the mortgagee and his capital remains unimpaired. The same reasoning we think applies to the municipality in the present instance.

The term "purchase money mortgage", as is well known, means a mortgage executed at the same time with the deed of conveyance to the vendor to secure the purchase price.

1 Pingrey on Mortgages, Para. 676.

We are, therefore, of the opinion that bonds issued against the subway would not create an indebtedness against the city in violation of the constitution, so long as they pledge only the physical subway itself and its income.

III.

HAS THE CITY THE POWER TO EXCLUSIVELY PLEDGE AND PAY THE TRACTION FUND AS INTEREST UPON SUCH BOND ISSUE, AND TO USE ANY PORTION OF SUCH FUND TO AID IN THE CREATION OF A SINKING FUND FOR THE RETIREMENT OF SUCH BONDS?

The answer to this inquiry depends upon the question whether the traction fund has been legally created as a special fund to be used for traction purposes and no other. The Traction Ordinance of 1907 (section 24 thereof), expressly constitutes the fifty-five per cent. gross receipts as a special fund devoted exclusively to the purchase and construction of street railways. The power of the city to pass this part of the ordinance has been assumed in the case of *Barsaloux v. City of Chicago*, *supra*. In this regard the court at page 611, said:

"Section 24 of the traction ordinance provides that the city shall deposit 55 per cent. of the net earnings of the traction companies to the credit of a separate fund to be kept and used for the purchase and construction of street railways by said city. Under this ordinance clearly the city would have no power to divert this fund to general corporate purposes, but using it to construct subways is not a diversion of such fund."

The Barsaloux case also further holds that:

"* * * the city has the power to acquire or construct street railways, and that 'street railways', properly construed, mean elevated, surface or underground

railways; that the City of Chicago may exercise this power in accordance with the traction ordinances of 1907, and may expend for such purpose either the special traction fund or any other available corporate funds belonging to the city."

If the city may expend so much of the traction fund as had accrued and accumulated at the date of the decision of the Barsaloux case, it is clear that it could pay out such fund as interest upon a bond issue, or to use it for the construction in whole or in part of the subway. If it may pay out the traction fund for such purposes, it follows that it may pledge it as a security by means of which to raise the present funds necessary for the construction of the subway. We think it equally clear that if, in the construction of the subway, it may both pledge this fund or pay it outright as it accumulates, and that if it is thought best to issue bonds against it as a security, it might make provision for using all or a portion of the traction fund to the establishing of a sinking fund which may take care of the indebtedness against the subway system when the same falls due.

IV.

HAS THE CITY THE POWER TO FURTHER USE ANY NET REVENUES RECEIVED EITHER FROM THE OPERATION OR THE LEASING OF SUCH A SYSTEM OF SUBWAYS WHEN CONSTRUCTED, FOR THE PURPOSE OF PAYING OFF SUCH BONDS?

The net revenues of the subway system, either from operation or rental, would be funds obtained by and flowing from the property created by the use of the money derived from the issuance of bonds. The revenues of the property itself may be used, in our opinion, when the property is completed and either operated by the city or rented to some street railway corporation for the purpose of creating and maintaining a sinking fund for the retirement of the bonds when they mature. In this way the property pays for itself—at least in part. Such course is sanctioned in the Alexander, Pope and Lobdell cases, hereinbefore mentioned.

V.

HAS THE CITY THE POWER TO PAY OUT OF SUCH BOND ISSUE THE COST OF SUCH RECONSTRUCTION OF UNDERGROUND MUNICIPAL UTILITIES AS ARE DISTURBED BY THE BUILDING OF SUBWAYS?

In the question as above stated, it will be necessary to distinguish between the cost of the reconstruction of underground municipal utilities which are owned by the city, and those municipal utilities which are owned by persons or corporations other than the city.

As to the latter utilities, we have already expressed the opinion under sub-head (e), that any cost which may be incurred by reason of the disturbance of such utilities in the building of the subway, is a necessary incident to their occupation of the street, and such cost must be borne by the several owners of the utilities disturbed or changed. It follows therefore, necessarily that no part of the cost for reconstruction or readjustment of such utilities can be paid for out of such bond issue or from any other funds of the City.

As to the cost of the reconstruction of underground municipal utilities owned by the city, the expense of the reconstruction and readjustment of the same is a necessary expense arising from and growing out of the construction of the subway, and as such, may be met in the same manner as any other legitimate expense occasioned by the building of the subway. These expenses are ones, which, in our opinion, may be properly paid out of any funds for subway purposes raised by bond issue.

CONCLUSION.

For the convenience of the Council in view of the extended nature of this opinion, we give below a summary of our opinion on the several questions requested by you.

I.

(a) The city has the general power, without further enabling legislation, to own and construct a system of subways.

(b) The city has the right to construct a system of subways by day labor if the statute passed by the last General Assembly is a valid one. In the absence of such legislation the city would not have the right so to do.

(c) The city has the right to construct a system of subways by contract for local transportation of passengers.

(d) The city has no right to construct or own a system of subways for the transportation of merchandise.

(e) The city has the right to provide for underground municipal utilities owned by the city.

The city in the construction of the system of subways is not limited to its present needs, but may provide for its future growth.

The city may allow utilities owned by individuals and private or quasi-public corporations to use a portion of the space in the subway, provided such use does not in any way interfere with the primary object of street railway transportation. The expense, however, of reconstruction and readjustment of such utilities must be borne by such individuals or corporations. (See Point V, *infra*.)

(f) The city has no power to operate a street railway in the system of subways without a popular vote approving of the proposition. The question was submitted to the people and was defeated.

(g) The city has the power to lease the system of subways constructed by it to railways incorporated under the laws of the state for the purpose of operating street railways, for a term not exceeding twenty years.

II.

The city has the power to issue bonds for the construction and equipment of subways, provided said bonds are a lien upon such property and income *only*, and are not included in the bonded debt of the city.

III.

The city has the right exclusively to pledge and pay the traction fund as interest upon such bond issue and to use any portion of such fund for the purpose of funding such bonds.

IV.

The city has the right further to use any net revenue received, either from the operation or the leasing of such subways when constructed, for the purpose of retiring such bonds.

V.

(a) The city has the power to pay out of such bond issue the cost of reconstruction or replacement of underground municipal utilities owned by itself which may be disturbed by the building of the subways.

(b) The city has no power to pay out of such bond issue the cost of reconstruction or replacement of underground municipal utilities owned by individuals and private or quasi-public corporations, which may be disturbed by the building of the subways.

For the further information of your Honorable Body, we attach hereto as an appendix, a statement of May 10, 1911 furnished by the office of the Comptroller of the financial condition of the city with respect to its bonded indebtedness as compared with the constitutional limit of five per cent. based on the value of taxable property of the city as ascertained by the last assessment for the State and County taxes.

Respectfully submitted,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

FRANK JOHNSTON, JR.,
Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,
Corporation Counsel.

JULY 10, 1911.

TO THE HONORABLE BOARD OF TRUSTEES OF THE POLICE PENSION FUND OF THE CITY OF CHICAGO.

Gentlemen:

The papers in the case submitted to me for an opinion discloses that John J. Cooney, a police patrolman, on the 22d day of January, 1910, had served seven years upon the force.

He was assigned to night duty and upon the day in question had slept in the station at the conclusion of his night patrol work and awoke about noon leaving the station for his home at 12:50 in the afternoon. A few minutes later he slipped upon an icy sidewalk lacerating his cheek. Within the next few hours erysipelas set in from which disease he died shortly after.

The question immediately presented is whether his death was due to injuries received "while in the performance of duty."

Section 6 of an Act to provide for setting apart, formation and disbursement of a police pension fund, adopted May 16, 1903, Hurd's Revised Statutes, 1908, 396, applicable to this case recites in part as follows:

"Whenever any member of the police force of such city * * * shall lose his life, while in the performance of his duty, or receive injuries from which he shall thereafter die" his widow or children shall be entitled to a pension.

There is no evidence before me that the officer was going to his home upon any official business of the police department or in pursuance of any order from his superior. The inquiry then arises as to whether a police patrolman engaged not in the actual performance of any duty connected with his position, but merely engaged in the performance of a private act or function who loses his life while thus engaged is entitled to a pension under this section of the act.

In *Rhodes v. United States*, 79 Fed. Rep. 740 (C. C. A.) the United States sued Rhodes to recover back a pension which it was alleged had been fraudulently obtained by him on representations that he had contracted a disease of the eyes while engaged in its service and in the line of duty as a soldier, when in fact the government charged that he had contracted the disease before he entered the service. The statute under which the applicant had obtained his pension provided that a pension should be paid to a soldier who was "disabled by reason of any wound or injury received, or disease contracted, while in the service of the United States and in the line of duty."

In an instruction given the jury in regard to a disease

contracted in the line of duty the court said that "the service must have been the cause of the disease and not merely coincident with it in time," and relative to this point the court say:

"This is the patent and natural meaning of the language of the statute. It places the service and the discharge of duty in the relation of causes to the injuries and diseases that warrant the grant of pensions. It allows a pension for wounds and injuries received, and for diseases contracted, in the service and in the line of duty. No one would seriously contend that every wound, injury, or disease received or contracted during the term of service is pensionable under this law. A wound or injury inflicted upon himself by a soldier, or received by him while hunting wild animals, or squabbling with his comrades for his own amusement, or while doing any other act not in the line of his duty, would form no basis for a pension. The reason is that it would not be caused by his presence in the line of duty. The same rule applies to wounds, injuries, and diseases; for in the law they stand together in a single class. The result is that neither injury nor disease can authorize the grant of a pension under the acts of congress unless it is caused by the presence of its victim in the line of duty when it was received and contracted."

The provision of the act of Congress in question in this case was exhaustively considered and authoritatively construed by Attorney General Cushing in 1855. He concluded his discussion of it with these words: 'In fine, the phrase "line of duty" is an apt one, to denote that an act of duty performed must have relation of causation, mediate or immediate, to the wound, the casualty, the injury, or the disease, producing disability or death.' 7 Op. Attys. Gen. 149, 161; 17 Op. Attys. Gen. 172."

It will be noted that in the case cited the language of the statute "in the line of duty" is very similar to the language of the pension act "in the performance of duty."

In *Hart v. Kennedy et al.*, 39 Barbour 186, the court discusses the propriety of a service of process and the arrest of plaintiff, a policeman, by the defendant as being in contravention of an act declaring that no officer should be liable to arrest whilst on duty. Under Section 60 of an act relating to the metropolitan police it was provided police officers of a

certain line (in which was the defendant) should be "deemed to be always on duty."

Section 1 of Rule 32 on General Police Duty of the book of Rules and Regulations of the Chicago Police Department provides that:

"Patrolmen as well as all other members or employes of the department for the purpose of discipline, will be considered as being always on duty, although certain hours are allowed to the members for the performance of duty on ordinary occasions, yet they are expected to respond immediately, day or night, in any emergency on notice that their services are required."

It will thus be seen that the rules of the New York Department and here are substantially similar as regards policemen being considered always on duty from a departmental standpoint.

The court say:

"It appears from the opinion of the learned justice who made the order at special term, vacating and modifying the order of arrest in this case, and it was conceded on the argument before us, that the order of arrest was vacated and discharged, as to the defendants Kennedy and Davis, on the ground that the one was the superintendent, and the other a captain of the metropolitan police, when the alleged arrests and false imprisonment of which the plaintiff complains took place; and that being such officers, by the 34th section of the act and the 60th section of the rules and regulations enacted or passed by the commissioners, under the 27th section of the act, they were as such officers free from arrest on civil process, at all times and under all circumstances. It is difficult to see upon what other theory the order vacating the order of arrest as to the defendants Kennedy and Davis, and modifying and retaining it as to the defendant Smith, could have been made. It is plain that it was an error to vacate and discharge the order as to the defendants Kennedy and Davis on this ground. The 34th section of the act, by declaring that no person holding office under the act shall be liable to arrest on civil process, or to service of subpoenas, etc. *whilst on duty*, plainly impliedly declares that persons holding office under the act shall be liable to arrest on civil process, or to service of subpoenas, etc. whilst not actually on duty. This section impliedly declares that no person holding office under the

act shall be deemed to be actually on duty *at all times and under all circumstances* so as never to be liable to arrest or service of subpoena whilst holding the office.

The police commissioners had no power, under the 27th section of the act, to enact any rule or regulation in conflict with the 34th section. The 27th section contains an express proviso to that effect."

In the special concurring opinion Mr. Justice INGRAHAM says:

"The commissioners may have power by rules to provide that for reasons of their own, officers in their employ shall be deemed always on duty; but no such regulation can alter the meaning of the terms used in the statute 'actually on duty.' Though they may be *deemed* to be on duty, yet if they are not *actually* on duty the officers are liable to arrest and to be served with subpoenas."

Under the reasoning of the above case it may be said that the expression in the statute of the language to the effect that pensions shall be given to the family of an officer receiving injuries in the performance of duty negatives the right of the Board to give a pension when injuries are received in any other manner.

The Hon. Wayne MacVeagh, Attorney General of the United States, in the opinions of his department Vol. 17, page 172, quoting Attorney General Cushing says:

"Was the cause of disability or death a cause within the line of duty or outside of it? Was that cause appertaining to, dependent upon, or otherwise necessary and essentially connected with, duty within the line, or was it unappurtenant, independent, and not of necessary and essential connection? That, in my judgment, is the true test-criterion in the class of pension cases under consideration. This criterion, he says, will bestow disability or death pensions only in those cases, but in all those cases where the cause of disability or death is the logical incident or probable effect of duty in the service. It will thus be seen that the real question in the case is as to the cause mediate or immediate of the injury."

In the case then under consideration Mr. Wetmore when in the service of the United States and under orders to proceed to Columbus, Ohio, on public business, went to a railroad depot and while expediting the checking of his baggage was

struck on the head by the baggage master with a hatchet the results of which seriously disabled him. The question arose as to whether the injury was received in the line of duty.

The opinion goes on to say:

“* * * Mr. Wetmore’s assumption of the duties of his office caused him to be subject to orders; the order caused him to come in contact with the baggage master. If there did not intervene between this contact and the injury an adequate and sufficient cause for which Mr. Wetmore was responsible, he is entitled to his pension.”

The conclusion of the opinion is that the injury was the result of an act of Wetmore’s not taken directly in the line of his duty, and consequently, the performance of his duty was not the cause of his injury.

In *People ex rel. Ramsdell et al. v. Jewett et al.*, 36 N. Y. Sup. 778, the word “duty” receives judicial construction in relation to a charter provision of New York which provides that no two platoons of patrolmen shall be on duty at the same time. The court said:

“If the word ‘duty’ as used in the statute, means actual, active, patrol duty, as I think it does, then the defendants must succeed in this controversy, because they have not violated the law, but, have complied with all its requirements. The ‘duty’ of the relators, within the meaning of the charter, is measured by the service which they are obligated to perform as patrolmen. The word, as used in the charter, has no reference or relation to their conduct in religion, morals or ethics. The duty of the relators to respond to a call for service within the line of their vocation, in case of an emergency, is the same whether they be at the station house or in their own homes, or whether they be in uniform or not, when the call is made. In either case it is their duty to respond and perform in a proper manner the necessary service, and it is only while they are performing such service that they are on duty within the meaning of the charter. My conclusion upon this point, therefore, is that the word ‘duty’ as used in the charter, means actual and active duty, as distinguished from being kept in reserve or within call for such actual and active duty.”

I can, from a consideration of the above authorities, find no warrant for the payment by your Board to the applicant of a pension while he was technically on duty, though, ac-

cording to the terms of the police rule, he was not actually and actively performing any specific act of duty. He was going to his home as any citizen in private life might be. The pension fund is not a general insurance fund, and only provides pensions in certain cases enumerated by statute which enumeration excepts by implication all those applications which do not come within the statutory warrant.

To hold that the present applicant should receive a pension would be to open the door for all sorts of cases of a similar nature. If this applicant should be held to be injured while in the performance of his duty the same might be said of an officer who in returning from his station to his home becomes involved in a personal fracas resulting in an injury or who accidentally or intentionally shot himself in his home, or who fell down stairs while performing some labor incident to his domestic life. As has been well said by the Attorney General of the United States, 7 Op. Atts. Gen. 163:

“Was the cause of disability or death a cause within the line of duty or outside of it? * * *

To pension disabilities or deaths occurring in the mere course of nature, and having no relation of casualty in duty, or disabilities or deaths produced by diseases or casualties happening to an officer or soldier in the prosecution and pursuit of his private affairs and amusements, or whilst employed on furlough in lucrative occupation not official, is not required by any consideration of public service.”

In conclusion I am of the opinion that under the law your Board is without power to grant the application.

Yours respectfully,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,
Corporation Counsel.

CHICAGO, JULY 10, 1911.

HON. JOHN E. TRAEGER, City Comptroller.

Dear Sir:

Your communication of recent date, addressed to the Corporation Counsel for an opinion as to whether the employes

of the House of Correction are included in an Act passed by the Legislature in the session of 1911 to provide for the formation and disbursement of the pension fund in cities, villages and incorporated towns having a population exceeding 100,000 inhabitants for municipal employes appointed to their positions under and by virtue of an Act entitled "An Act to regulate the Civil Service of cities," approved and in force March 20, 1895, and for those who were appointed prior to the passage of said Act and who are now in the service of said city, village or town, has been referred to me for reply.

Section 1 of the municipal employes' pension fund act contains the following:

"Provided, however, that the provisions of this Act shall not apply to temporary or probationary employes nor to those defined as sixty-day employes by said Act, nor to any employe who is sixty or more years of age at the time this Act is in force and effect and who at said time has not been in the service of such city, village or town for at least ten years, *nor to any employe of such city, village or town now or hereafter participating in any other municipal pension fund.*"

Section 2 of the Act providing for the setting apart, formation and disbursement of a House of Correction employes' pension fund in cities having a population exceeding 150,000 inhabitants, reads:

"The term 'employe,' under this Act, shall include all persons in the employ of any such house of correction receiving a stipulated salary or wage per annum, and this Act shall apply only to those employes who voluntarily accept and agree to comply with its provisions. Any employe, a part of whose salary may be set apart hereafter to provide for the fund created by this Act, may be released from the necessity of making further payments to said fund by filing a written notice of his or her desire to withdraw from complying with the provisions of this Act with the board of trustees hereinafter mentioned, which resignation shall operate and go into effect immediately upon its receipt by said board of trustees."

You will please note, therefore, that the municipal employes' pension Act is compulsory in its nature and that the House of Correction employes' pension Act applies only to those employes who voluntarily accept and agree to comply

with its provisions. It is, accordingly, incumbent upon the employes of the House of Correction to elect which fund they shall contribute to.

If after the first day of July, A. D. 1911, a House of Correction employe becomes a member of the House of Correction employes' pension fund he thereby forfeits all right to become a member to the municipal employes' pension fund, until such a time as he has resigned from the House of Correction pension fund as provided in that Act.

If a House of Correction employe elects to become a member of the municipal employes' pension fund then he is forever barred from participating in the House of Correction employes' pension fund.

Respectfully yours,

EDWARD T. WADE,
Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,
Corporation Counsel.

CHICAGO, JULY 10, 1911.

MR. L. E. GOSSELIN, Esq., Deputy Comptroller.

Dear Sir:

We have your letter of the 6th inst. in the above matter, together with two restraining orders issued by Referee B. Wean, in the matter of Edward Flathau bankrupt, and also the originals of two assignments of salary of said Edward Flathau, which have been filed with you.

From these documents, as well as from interviews we have had with Mr. Healy of your office, we gather the facts to be as follows:

Edward Flathau is a police patrolman receiving a salary of \$1,200.00 a year, payable in monthly payments of \$100.00 each. From each monthly payment there is deducted the sum of \$1.00 for a pension fund, leaving the net monthly payment \$99.00. This monthly payment is, under the rules and the practice of your office, payable on the 1st of the month following the month in which it is earned. That is to say the June salary would be payable on the 1st of July.

On June 23rd a petition was filed in the proper court to have Flathau adjudicated a bankrupt.

On June 24th Flathau made an assignment, expressed to be for valuable consideration, whereby he assigned to one M. A. Dunham all wages and claim for wages earned and to be earned and all claims or demands due or to become due to him from the City of Chicago. This assignment contains a power of attorney, empowering Dunham as his attorney to receive any money which may become due to him. This assignment was filed in your office on the day it bears date.

On June 26th Flathau was adjudicated a bankrupt. We are not sure as to this date but it is so given to us by Flathau's attorney.

On June 27th Flathau made a second assignment expressed to be for valuable consideration to one Albert P. Snite of all salary or wages or claims for salary or wages due him from the City of Chicago at any time before the expiration of six months from the date hereof. This assignment also contains a power of attorney. This assignment was also filed in your office on the day on which it bears date.

On the 6th of July, 1911, a restraining order was made by Referee Wean in the matter of Edward Flathau, bankrupt, restraining Dunham from proceeding in any manner to enforce collection of the salary due said bankrupt at the time of the filing of the petition and on the same day a similar order was made restraining in like manner the second assignee, A. T. Snite, who is in said order described as A. T. Slater.

We do not deem it necessary to refer further to these temporary restraining orders. It will be noted that these orders referred to salary *due* at the time of the filing of the petition, and, upon the facts as above stated, no salary was then due.

No trustee in bankruptcy had been appointed up to Saturday the 8th instant.

On this state of facts Flathau contends that his entire salary for the month of June should be paid to him by your office, and he is very urgent that this should be done at once.

In your letter you ask us to advise you as to what disposition should be made of this salary. To the questions raised

by this case the following propositions and authorities are pertinent.

1. As a general proposition an employe may assign, for valuable consideration, the wages or salary coming to him in a specified employment; and such assignment if not limited as to time, will be valid so long as the employment lasts.

Mallin v. Wenham, 209 Ill. 252.

2. This general rule is qualified, in case of the officers or employes of municipal corporations, to the extent that such officers or employes cannot make a valid assignment of unearned wages or salary.

City of Chicago v. People, 98 Ill. App. 517.

Bliss v. Lawrence, 58 N. Y. 442.

4 Cyc. 19-20.

3. The statute of 1905, which provided that assignments of salary or wages should be void unless executed and acknowledged in manner required by the statute, and unless, in case of a married party concurred in by the wife or husband, is unconstitutional.

Massie v. Cessna, 239 Ill. 352.

4. The statute of 1905—which subjected the wages or salaries of employes of certain municipal corporations to garnishment—is unconstitutional.

Badenoch v. City, 222 Ill. 71.

5. Under the provisions of the bankruptcy Act of 1898, the trustee is invested with the title to all property which, prior to the filing of the petition in bankruptcy, the bankrupt could by any means have transferred.

Sec. 70, Par. a, subdiv. 5 of Act of 1898.

5 Cyc. 344, note 48.

The title of the trustee when appointed, vests as of the date of the adjudication.

For an explanation of the seeming contradiction between these two statements, see note to Cyc. above referred to. It seems well settled that, in the absence of actual or constructive fraud, the bankrupt can make a valid disposition of his property between the date of the presentation of the petition and the date of the adjudication.

It would seem, therefore, that the question whether the salary for the first twenty-two or twenty-three days of June would, apart from the assignment of June 24, vest in the trustee in bankruptcy, if and when appointed, would depend upon the further question whether the bankrupt could by any means have transferred such salary previous to the presentation of the petition. Salary which was both earned and payable after the presentation of the petition would certainly not vest in the trustee; and salary which was both earned and payable after the assignment would certainly not vest in the assignee.

But the propositions above laid down leave this question still undecided. When the assignment of June 24th was made by Flathau he had *earned* twenty-three days' salary, although this salary was not *payable* until July 1st. Was this twenty-three days of *earned* salary assignable? If so, it would either belong to the assignee in the assignment of June 24th, or, if that assignment was on any ground invalid under the bankruptcy law, it would vest in the trustee in bankruptcy.

We have examined all the authorities we could find with a view to answering this question.

Some of the cases say that unearned salary is not assignable, but that earned salary is assignable. Some say that the salary of a municipal employe is not assignable unless and until it has become due and payable.

We have also examined three opinions written upon this subject of the assignment of wages and salary of municipal employes by previous corporation counsel.

The first of these is dated April 15, 1898, and was rendered by Corporation Counsel Thornton. The second is dated July 6, 1904 and was rendered by Corporation Counsel Tolman, and the third is dated January 8, 1908, and was rendered while Mr. Brundage was Corporation Counsel, and is approved by Mr. Miller as first assistant.

We incline to the opinion that so much of the salary for the month of June, 1911, as was *earned* previous to the presentation of the petition in bankruptcy was assignable, and that, therefore, apart from the assignment, the salary earned up to the time of the presentation of the petition would vest in the trustee, when appointed.

But, it is unnecessary for us to further discuss this question or to definitely determine it one way or the other. There is certainly sufficient doubt as to whether the assignments were valid to the extent of the wages then earned to justify your office in holding back this salary until the various claimants have settled their differences.

When opposing claims are made to funds in the hands of the City, and there is reasonable doubt as to which party is entitled to payment, the City is not obliged to take it upon itself to decide the question at its risk.

If anyone of the various claimants tries to enforce payment the City may interplead them.

As to the three days' wages which have been earned since the date of the last assignment and since the adjudication in bankruptcy, we do not think that there is any danger that either the assignee or the trustee in bankruptcy could establish any claim to this sum.

If it be consistent with the practice of your office to split the check for the month's salary, you may safely pay the amount of this three days' salary to the officer.

You may also safely pay him the salary for July when same becomes due, if you do not in the meantime receive notice of any further assignment by him.

Since the above opinion was dictated Flathau has been in to see me (Dillon). He admits that the signatures to the two assignments are genuine, but insists that the dates have been filled in since he signed them. He says he signed an assignment to Dunham in October, 1910, and none since; and that he signed an assignment to Snite in April, 1911, and none since. If this be true, the whole case would be different. But we cannot advise the City to take chances on this. Unless and until Dunham and Snite shall admit the truth of this claim, or it shall be determined in a proper legal proceeding that the facts are as Flathau claims, we must adhere to the advice above given.

Respectfully,
WILLIAM DILLON,
Assistant Corporation Counsel.

Approved:
WILLIAM H. SEXTON,
Corporation Counsel.

JULY 11, 1911.

HON. WILLIS O. NANCE, Alderman, 7th Ward.

Dear Sir:

With reference to your request for an opinion as to whether the County Hospital can be compelled to accept patients suffering from delirium tremens or those who are commonly termed "drunks," I beg to state that the matter has been assigned to me and I desire to submit the following:

I find the Cook County Hospital came into existence by reason of the fact that the State gave the Counties power to establish poor farms, poor houses, etc., and the County Hospital is merely a branch of the poor house, the distinction being that the County Hospital was established to take care of the sick poor as compared with the poor in good health who are sent to the poor house.

Chapter 34, Section 36, Hurd's Revised Stat. 1908, p. 590, provides:

"It shall be the duty of the county board of each county to erect or otherwise provide, when necessary, and the finances of the county will justify, and keep in repair a suitable court house, jail or other necessary county buildings."

Chapter 107, Section 14, Hurd's Rev. Stat. 1908, provides:

"Every county (except those in which the poor are supported by the town) shall relieve and support all poor and indigent lawful residents therein, except as herein otherwise provided."

With reference to the duty of the county to furnish board, nursing and medical aid to the sick poor, our Supreme Court in numerous cases has construed the statutes and held that it is the duty of the county to furnish board, nursing and medical aid to the sick poor.

In the case of *County of Parry v. City of Du Quoin*, 99 Ill. 479, 483, the court held:

"The duty upon the county to relieve and support the poor and indigent within its limits is, plainly to be seen, absolute."

Therefore the County Hospital comes into existence by reason of the duty which falls upon the county to care for

the sick poor, and the only question remaining is who would come under the head of the sick poor, and by "poor" the statute says that the patient must be so poor as to be a pauper. The Century Dictionary defines "pauper" as follows:

"A very poor person; a person entirely destitute of property or means of support."

The rules of the county board which define who shall be admitted to the Cook County Hospital under the general heading are found in Rule 32, page 886, Official Record of the Proceedings, Thursday, June 22, 1911.

Rule 32 reads as follows:

"No person shall be admitted as an inmate of the hospital who is known to be financially able to provide for himself, and whenever it is ascertained that such persons are being cared for they shall be discharged."

This simply follows the statute and so we are confronted with the question of the admission of people suffering with delirium tremens, or drunkenness,—whether they come under the heading of paupers. I do not believe that a man suffering from delirium tremens, if he has sufficient money to acquire the disease, and he could hardly have acquired the disease without money, could be considered a pauper, nor that those who are known as "drunks" come under the definition of pauper.

I, therefore, beg to conclude that in my opinion the County Hospital cannot be compelled to receive people suffering from delirium tremens or drunkenness unless these people are without funds or relatives and would come under the meaning of the word "pauper." Only in such cases, where after investigation the people suffering from delirium tremens or the liquor habit have shown that they are entirely dependent upon the county would the County Hospital be compelled to receive them. The only way to care for these people is for the city to build its own hospital which the legislature gave it full power to do.

Yours very truly,

HARRY J. GANEY,

Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,

Corporation Counsel.

JULY 12, 1911.

HON. VERNON L. BEAN, Secretary, Board of Examiners of Plumbers.

Dear Sir:

We have for reply, your communication under date of July 1, 1911, in which you request this department for an opinion as to the legality of the right of the Board of Examiners of Plumbers to interfere, by compelling the employment of licensed plumbers, with the plumbing work which is being done under the direction of Dr. A. L. Winston, Chief of the Chicago Food and Drug Laboratory, Department of Agriculture, United States Government.

We are informed, from your communication and from a conversation had with you by the writer, that Dr. A. L. Winston is engaged in certain plumbing work on the sixteenth floor of the new Heisen Building, at the southwest corner of Dearborn and Harrison streets, which is rented by the United States; that it is experimental work known as "laboratory plumbing"; that the drainage in and about this work is through the City's sewer system; that the water used is supplied by the City and that said plumbing work is directly connected with the City's water works system.

The Legislature of this State passed,

"An Act ceding to the United States exclusive jurisdiction over certain lands acquired for public purposes within this State and authorizing the acquisition thereof (Approved and in force April 11, 1899)."

Sections 24 and 25 of said Act, Chapter 143 of Hurd's Revised Statutes are,

"Section 24—BE IT ENACTED BY THE PEOPLE OF THE STATE OF ILLINOIS REPRESENTED IN THE GENERAL ASSEMBLY; that the consent of the State of Illinois is hereby given, in accordance with the 16th clause, 8th Sec. of first article of Constitution of the United States, acquisition by the United States by purchase, condemnation or otherwise, of any land in this State, required for custom houses, court houses, post-offices, arsenals, or other public buildings whatever, or for any other purposes of the Government.

Section 25—That exclusive jurisdiction in and over any land so acquired by the United States shall be, and

the same is hereby, ceded to the United States, for all purposes except the administration of criminal laws and the service of all civil processes of this State; but the jurisdiction so ceded shall continue no longer than the said United States shall own such lands."

It is our opinion that the Board of Examiners of Plumbers has jurisdiction over this plumbing work done in this room in the Heisen Building. These premises being rented by the United States is not an acquisition by the United States of *any land*. The exclusive jurisdiction ceded is *in and over any land* acquired by the United States by purchase, condemnation or otherwise.

You will find the following provision in Section 1782 of the Chicago Code of 1911:

"No person, except a licensed plumber shall be permitted to make any alteration or repair to or do any work in and about the City's Water Works System or with any pipe or sewer connected with the City's Sewer System.
* * *"

We are of the opinion that the plumbing work that Dr. A. L. Winston is engaged in falls within the terms of Section 1782 of the Chicago Code of 1911.

Because of the nature of the work and its connection with the Chicago Water Works System and the premises not being *land* or *lands* within the meaning of "Sections 24 and 25," but being rented by the United States, we are of the opinion that the Board of Examiners of Plumbers can enforce, in and about this plumbing work, the employment of licensed plumbers.

Very truly yours,

HENRY A. BERGER,
Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,
Corporation Counsel.

JULY 13, 1911.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Replying to your request for an opinion as to the power of the City Council to require cigar stores to be licensed, we

beg to say that, while the *legislature* may, require a license fee for the exercise of any avocation (*People v. Steele*, 231 Ill. 340), a *city* has no inherent power to license any occupation or to exact any license fee from any person. The power for a city so to do must be found in its charter, and such power must be either expressly given or be a necessary incident to the carrying out of a power so granted.

Wilkie v. City of Chicago, 188 Ill. 444;

City of Chicago v. Netcher, 183 Ill. 104.

The City of Chicago, being organized under the General Incorporation Law (the Cities and Villages Act), must find its powers in the said General Incorporation Law.

Among the powers delegated to city councils in Section 1 of Article V of the Cities and Villages Act are the following:

“Fifty-third. To provide for and regulate the inspection of meats, poultry, fish, butter, cheese, lard, vegetables, cotton, *tobacco*, flour, meal and other provisions.”

“Sixty-sixth. To regulate the police of the city or village and pass and enforce all necessary police ordinances.”

“Seventy-eighth. To do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease.”

In the case of *Gundling v. City of Chicago*, 176 Ill. 340 (affirmed by the Supreme Court of the United States in 177 U. S. 183), the Supreme Court of Illinois held that under the powers conferred in said paragraphs 53, 66 and 78, the City of Chicago had the authority to pass the then existing ordinance regulating and licensing the sale of cigarettes, and that the consensus of opinion was that cigarettes were injurious to young persons and that the ordinance was in the interest of the public health and welfare of a large class of the community and was a proper exercise of the police power and within the express power granted to cities by said paragraphs 66 and 78.

If the City Council should deem the use of *tobacco* deleterious and injurious, we are of the opinion that it could properly pass an ordinance in the interest of the public health providing for the inspection of and regulating and licensing the sale of *tobacco*. The ultimate decision of the question as

to whether the use of tobacco was in fact injurious to the public health, and, consequently, whether the sale of tobacco was a proper subject of regulation, would, however, rest with the courts.

It should be noted that the adoption of an ordinance generally licensing the sale of tobacco might affect the validity of the existing ordinance regulating and licensing the sale of cigarettes, for the reason that cigarettes might properly be classed as one of the forms of tobacco.

Hotelling v. City of Chicago, 66 Ill. App. 289.

We do not, however, find any power conferred upon the City Council, which would authorize it to undertake to regulate and license *cigar stores*. The only reason that occurs to us as a basis for the regulation and licensing of such stores, is that they deal in a commodity (tobacco), which may be considered deleterious to the public health.

Tobacco is sold in many places other than cigar stores. There is nothing, to our knowledge, about the sale of tobacco in cigar stores, which tends to affect the public health, morals, safety or welfare in any way different from the sale of tobacco in the numerous other places in which it is sold.

We, therefore, are of the opinion, that an ordinance requiring a license of cigar stores while permitting the sale of tobacco without license in places other than cigar stores, would be unequal, discriminative and invalid.

Yours respectfully,

BRYAN Y. CRAIG,

Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,

Corporation Counsel.

JULY 13, 1911.

HON. CARTER H. HARRISON, Mayor:

Dear Sir:

Replying to your verbal request for an opinion:

First: As to the methods of computation of taxation on real estate (having in mind particularly the assessed value

being based on one-third of the actual value instead of one-fifth as heretofore); and,

Second: As to the methods of computation of the constitutional limitation of municipal indebtedness, I beg to reply as follows:

First: An Act for the assessment of property and providing the means therefor, and to repeal a certain act therein named. In force July 1, 1898. Hurd's Rev. Stat. 1909, Section 9 (page 1880) provides as follows:

"All real property subject to taxation under the general revenue laws of the state, including real estate becoming taxable for the first time shall be listed in the name of the owner thereof by such owners, or persons required by law, or their agents, or the officers provided by law, and assessed for the year one thousand eight hundred and ninety-nine (1899) and every fourth year thereafter, with reference to the amount owned on the first day of April in the year in which the same is assessed, including all property purchased on that day, which assessment shall be known as the general assessments, and as modified or equalized or changed as provided by law, shall be the assessment upon which taxes shall be levied and extended during the quadrennial period for which the same is made; Provided, that no assessment of real property shall be considered as illegal by reason of the same not being listed or assessed in the name of the owner or owners thereof."

Section 18 provides in part as follows:

"Real property shall be valued as its fair cash value, estimated at the price it would bring at a fair voluntary sale in the course of trade, which shall be set down in one column, to be headed 'assessed value' * * *."

"The one-third value of all property so ascertained and set down shall be the assessed value for all purposes of taxation, limitation of taxation and limitation of indebtedness prescribed in the constitution or any statute."

Section 2 of an Act concerning the levy and extension of taxes; in force July 1, 1901, Hurd's Rev. Stat. 1909, page 1891, provides in part as follows:

"The rate per cent. of the tax levy of every county, city, village, town, township, school district, park district, sanitary district, road district, and other public authorities (except the state), shall be ascertained and deter-

mined (and reduced when necessary as above provided), in the manner hereinbefore specified and shall then, commencing with the year 1909 be extended by the county clerk upon the assessed value of the property subject thereto (being one-third of the full value thereof) as equalized according to law."

The former method of basing the assessed value upon one-fifth of the actual value instead of one-third as now provided for by law will thus be seen to increase the city's borrowing power under the constitutional limitation which restricts it to five per cent. of the assessed value of the property as ascertained by the last assessment for state and county purposes. The exact proportion of increase in borrowing power may be represented by an equation wherein the former limit of borrowing power is to the present limit as the rate of one-fifth of the actual value of the property is to the rate of one-third of the actual value of the property. In other words it is the relation which five-fifteenths of the actual value bears to three-fifteenths of the actual value or two-fifteenths, which represents, in concrete terms, an increase in the city's borrowing power of sixty-six and two-thirds per cent.

Second: The method of computation of the constitutional limitation of municipal indebtedness has been commented upon by the Supreme Court of Illinois in the case of *Stone v. City of Chicago*, 207 Ill. 492. The following items have been considered by the court as constituting the indebtedness of the city.

1. Bonds (general);
Bonds (water).
2. *Judgments v. City*, unprovided for;
Accrued interest, corporate.
3. Water fund debt;
Water pipe extension certificates;
Warrants on Treasurer outstanding;
Accrued interest, water;
Judgments v. City.

The total of these different items constitutes the total debt of the City. Five per centum of the assessed valuation of the City's taxable property, as shown by the last assessment for state and county taxes, is computed, the assessed valuation

being shown by the books of the County Clerk. From this five per centum of the assessed valuation is deducted the total debt as computed above, and the remainder, if one there be, forms the unexercised borrowing power of the city.

Very respectfully,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,
Corporation Counsel.

JULY 14, 1911.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Complying with your request for an opinion as to the power of the City Council to require billiard and pool rooms to be closed at twelve o'clock midnight, we beg to say that among the powers conferred on City Councils by Section 1 of Article V of the Cities and Villages Act is the following:

“Forty-Fourth: To license, regulate, tax or prohibit and suppress billiard, bagatelle, pigeon-hole or any other tables or implements kept or used for a similar purpose in any place of public resort, pin alleys and ball alleys.”

Ordinarily the power to regulate a lawful business is limited to the extent that the public health, safety, morality, comfort and general welfare require.

People v. Steele, 231 Ill. 340 (345).

The power conferred by said paragraph Forty-fourth is not only to regulate but to prohibit and suppress, which, in our opinion, would include a partial suppression such as would result from enforced closing during certain hours of the night.

Moreover billiard and pool rooms, bowling and pin and ball alleys are by reason of the general character of such places subject to such restrictive regulations as may be prescribed by municipal authorities under their police power.

The Supreme Court of Nebraska in the case of *Morgan v. State*, 90 N. W. 108, (1902) in speaking of billiard and pool rooms said:

“The interests of peace, good order and public moral-

ity require that billiards and pool rooms should be conducted according to such rules and standards and subject to such restrictions as may be prescribed by the municipal authorities. Such a room is not, we concede, *per se* a nuisance, but without regulation and supervision it is likely to become so anywhere, and in a village it is apt to degenerate into a trysting place for idlers and nidus for vice."

The Supreme Court of Missouri in the case of *Tarkio v. Cook*, 120 Mo. 1, sustained an ordinance of the City of Tarkio which provided that no billiard halls should be kept open nor should any tables therein be used for playing games thereon after nine o'clock in the evening. This ordinance was passed under a power given to the city by the legislature generally to pass ordinances to maintain the peace, good government, health and welfare of the city, and expressly to regulate tables on which games are played for amusement.

The court in its opinion said:

"Keepers of billiard tables are not recognized by the state as exercising a useful occupation. They are subject to police regulation by the state and by cities under powers granted to them by the state. * * * Public billiard halls are regarded by many as vicious in their tendencies, leading to idleness, gambling and other vices. Each municipality can best determine for itself to what regulations they should be subjected, and, unless an ordinance fixed hours for their use, which were in effect prohibitory, the courts should not interfere with the discretion exercised. We cannot say that the ordinance in question in requiring billiard halls to be closed at nine o'clock in the evening is unreasonable or in derogation of any common rights."

The City Council of Chicago has recognized the injurious character of billiard halls and similar places by providing by ordinance (Sec. 170 of the Chicago Code of 1911) that a keeper of a billiard or bowling room who permits a minor, under eighteen, to use a table, or frequent such room, shall be subject to a fine, and also that any minor, under eighteen, found in such room shall be fined. Similar provisions are common and have been repeatedly upheld.

We are of the opinion that an ordinance requiring the

closing of billiard and pool rooms during the late hours of the night would be valid.

Inasmuch as saloons are now required to close between the hours of one a. m. and five a. m. and many billiard and pool rooms and bowling alleys are operated in or in conjunction with saloons, a regulation requiring the closing at twelve o'clock midnight of places where billiard and pool tables are kept for profit would present serious practical difficulties.

We, therefore, suggest the advisability of having the hours for closing billiard and pool rooms conform to the hours for closing saloons, that is, between one a. m. and five a. m.

We also suggest that bowling and pin and ball alleys be included with billiard and pool rooms in the proposed closing ordinance for the reason that they are closely related in character to billiard and pool rooms, and are often in the same room, and are now all included in one ordinance which provides for the licensing, etc., of billiard and pool tables and bowling and pin and ball alleys, (Secs. 167 to 170, Chicago Code of 1911).

We enclose herewith draft of an ordinance which we have prepared providing for the closing of billiard and pool rooms, bowling and pin and ball alleys between the hours of one a. m. and five a. m., which is modeled on the ordinance requiring the closing of saloons during the same hours (Sec. 1541, Chicago Code of 1911).

Yours respectfully,

BRYAN Y. CRAIG,

Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,

Corporation Counsel.

JULY 15, 1911.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF CHICAGO.

Gentlemen:

The attached order directing the Corporation Counsel to furnish your Honorable Body with an opinion as to the power of the street railway companies or their employees to direct the

making of arrests, and as to the duty of police officers to comply with such instructions or requests, has been referred to me.

Street railway companies or their employes have no more power to direct the making of arrests than other individuals have. The law makes no distinction in this regard. The street railway companies and their employes stand upon the same footing as other citizens, and it is not the duty of a police officer to make arrests unless a warrant issued by a court of competent jurisdiction has been placed in his hands for execution. The only exceptions to this rule are when the offense complained of has been committed in the presence of and in the view of the officer, and when a crime has in fact been committed and the officer has reasonable ground for believing that the person to be arrested has committed it. This rule has been so well settled in this State by statutory enactment and in the courts, that lawyers no longer seriously contend against it. The average patrolman is familiar with it.

Section 2 of the Bill of Rights, being Article II of the Constitution of 1870, provides that, "no person shall be deprived of life, liberty or property, without due process of law."

Section 6 provides "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue without probable cause, supported by affidavit, particularly describing the place to be searched, and the persons or things to be seized."

At common law arrests could be made by an officer or by a private person, without a warrant where the offense committed was a felony and there was reasonable grounds for believing the person to be arrested committed it. An arrest for a misdemeanor could only be made upon a warrant, unless the offense was committed in the presence of the officer or private person making the arrest.

Our Supreme Court in the case of *North v. People*, 139 Ill. 81, holds that arrest without warrant is not abridged by the Constitution where such arrests could be made at common law before its adoption.

Section 342, Chapter 38, of the Revised Statutes (1905) provides that "An arrest may be made by an officer or by a private person without warrant, for a criminal offense committed or attempted in his presence, and by an officer, when a criminal offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it.

The above section changes the common law in that it authorizes a private person to make an arrest only when the offense is committed in his presence. It will be seen that the private person has as much authority to make an arrest, without a warrant, as an officer has when the offense is committed in his presence, and more authority than the officer has if the offense was not committed in the officer's presence. In these street car cases it is seldom that the officer, unless he is present and riding on the car, sees the offense committed. If he makes an arrest without seeing the offense committed, he takes upon himself the responsibility and becomes liable in a suit for damages unless he can show that a criminal offense has been committed by some person as well as that he had reasonable grounds for believing that the person arrested committed such offense; the officer acts at his peril if he acts without a warrant and will be held liable if it turns out that no offense was committed. The private person, that is to say the street railway companies or their employes, who see the offense committed and who, under the statute, has authority to act without warrant should make the arrest in such cases. The responsibility should not be shifted to a police officer.

In cases of violation of city ordinances, Section 83 of the Cities and Villages Act gives an officer power to arrest without a warrant when the violation is committed in his presence, otherwise a warrant must be obtained.

Our statute (Section 342 above) seems somewhat broader in its provisions than the sections of the Constitution of 1870 above quoted would warrant. That section refers to criminal offenses. Section 280, Chapter 38, defines a criminal offense as "a violation of public law, in the commission of which there shall be a union or joint operation of act and intent, or criminal negligence." This definition is broad enough to cover

any violation of the Criminal Code regardless of any penalty imposed. Section 277 of the Criminal Code defines a felony as an offense which is punishable with death or by imprisonment in the penitentiary. All other offenses are classed as misdemeanors.

In so far as our statute, Section 342 above quoted, relates to misdemeanors and authorizes an arrest without warrant, where an arrest was not allowed without a warrant at common law, the courts may hold it to be unconstitutional and void, as conflicting with the spirit and intent of the Constitution, which provides in substance that "the right of the people to be secure in their persons," etc., "shall not be violated; and no warrant shall issue without probable cause, supported by affidavit," etc., for this provision will not afford much protection or security to the people in their persons if the legislature can authorize an officer to make arrests, when a court or magistrate is prohibited by it from issuing a warrant for that purpose unless supported by the proper affidavit.

On the whole it seems to me that the only safe rule for an officer to follow is that of the common law, to make arrest without a warrant only when he sees the offense committed, or when he knows a criminal offense *amounting to a felony* has been committed and has reasonable grounds to believe that the person to be arrested has committed it.

In all other cases, where the offense is not committed in his presence or view, he should insist upon a warrant for his protection. There is no reason of public policy, or otherwise, which requires that the responsibility of the street railway company or its employes who cause the arrest should be shifted to, or in part borne by the police officer.

Respectfully submitted,

(Signed.) GEO. P. FOSTER,

Assistant Corporation Counsel.

Approved:

(Signed.) WILLIAM H. SEXTON,

Corporation Counsel.

JULY 18, 1911.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

Replying to your communication of July 15, 1911, enclosing specifications and proposals for Power Piping Installation for the Roseland Pumping Station, and asking this department to advise you as to the legality of certain propositions in the specifications as follows:

First: The legality of the proposition in the specifications for bonus, which reads:

"The City will pay a bonus to the contractor at the rate of Fifty Dollars (\$50.00) for each day the Power Piping Installation is completed and ready for operation in advance of the time of completion of the work stated above."

Second: The legality of the proposition in the specifications for liquidated damages, which reads:

"The City will make a deduction from the contract price of Fifty Dollars (\$50.00) per day as liquidated damages for each day of delay after the expiration of above stated time until the Power Piping Installation is completed and ready for operation."

Third: The authority of the Commissioner to extend the time for completion of contract under the following proposition of the specifications.

"EXTENSION OF TIME. If the contractor is delayed by the City the time of completion will be extended by the Commissioner for a period equal to that of the delay."

I will consider the questions in the order in which they are above stated.

First: *The legality of the proposition in the specifications for bonus.*

The meaning of the word "bonus" as used herein, is a sum paid for services or upon a consideration in addition to or in excess of that which would ordinarily be given or paid.

In passing upon the meaning and validity of a bonus, the Supreme Court of the United States said:

"A proposition was submitted to the voters of which the affirmative was in these words: 'For appropriating the swamp lands of Wayne as a bonus to any company

for building a railroad through said county.' It is said that the word 'bonus' condemns the submission; that this word means a gratuity, a voluntary donation, a gift, and that a town or county cannot, although it have the direct authority of the legislature, give away its property. * * * In the first place, if it be assumed that the word is correctly defined as a gift, or gratuity, that meaning is controlled and limited by the connection in which it is here used, to wit: that in consideration of it the company receiving the lands will undertake to build a railroad through the county. It is not simply a bonus, but a bonus to any company who shall undertake the great task of building a railroad through the county. * * *

But, secondly, the meaning of the word bonus is not that given to it by the objection. It is thus defined by Webster: 'A premium given for a loan or a charter or other privilege granted to a company, as, the bank paid a bonus for its charter; a sum paid in addition to a stated compensation.' It is not a gift or gratuity, but a sum paid for services, or upon a consideration in addition to or in excess of that which would ordinarily be given."

Kenicott v. The Supervisors, 83 U. S. 452, 470-471.

The bidders had before them, at the time they prepared and made their bids, a copy of the specifications containing the provision for the payment of the bonus and they had a right to, and unquestionably did, at the time they figured their bid, take into consideration the additional sum of \$50.00 they would receive for each day the work would be completed in advance of the time stated.

There can be no doubt whatever, as a general proposition, as to the validity of clauses of this character. The only question which could arise from such a clause would be the fairness or reasonableness of the amount of the bonus offered; and, considering the amount involved, I believe the courts would hold the amount of the bonus to be fair and reasonable.

I am, therefore, of the opinion that the proposition in the specifications for bonus, when properly embodied in the contract, is legal and binding upon the City.

Second: *The legality of the proposition in the specifications for liquidated damages.*

Where there is an agreement between parties for the doing or not doing of particular acts, the parties may, when,

from the nature of the contract and subject matter the damages cannot be calculated with certainty, estimate beforehand the damages to result from a breach of the agreement and prescribe in the agreement itself, the sum to be paid by either by way of damages for such breach.

Our Supreme Court in passing upon the question of liquidated damages, has said :

“ ‘If the amount agreed to be paid for breach of the contract greatly exceeded the actual damages suffered by the appellant, * * * that is to say, if the amount agreed to be paid is out of proportion to the probable damages sustained, the court will be disposed to treat the stipulated sum as a penalty.’ * * * ‘The courts, especially in this country, have generally shown a marked desire to lean towards that construction which excludes the idea of liquidated damages and permits the party to recover only damages which he has actually sustained. The language of the contract is not controlling. * * *’

“Whether the term ‘liquidated damages’ is used or not, the idea of the courts is to ascertain, if possible, the actual damages sustained, and if it is possible to ascertain the actual damages, or if the amount of liquidated damages mentioned in the contract is exorbitant, the court will construe the amount as a penalty, rather than as liquidated damages. * * * And it seems from all the cases that, whatever may be the wording of the contract, the courts will admit evidence as to whether or not the strict enforcement of its provisions would work a hardship upon the obligor.”

Radloff v. Haase, 196 Ill. 365, 368.

The weight of authority seems to be that the amount stated in the specifications and contracts as liquidated damages should not exceed the actual damages sustained, for if it does, the courts are inclined to regard the amount stated as a penalty and limit the recovery to actual damages sustained.

In view of the fact that the actual loss and damages to the City in the case under consideration would be difficult to estimate correctly, and considering the magnitude of the work, I am of the opinion that the provision in the specifications for liquidated damages, and the amount named, when properly embodied in the contract, would be upheld by our courts.

Third: *The authority of the Commissioner to extend the time for completion of contract under the following proposition of the specifications.*

Our municipal code prescribes the manner in which contracts shall be let and defines the power and authority of the Commissioner to execute contracts. Section 2106 of The Chicago Code of 1911 provides, among other things, that certain contracts shall be executed by the Commissioner of Public Works on the part of the City, and every contract for a sum greater than \$500.00 shall have the approval in writing of the Mayor endorsed thereon, and shall be countersigned by the City Comptroller, and the code delegates no authority to the Commissioner to alter, change or modify any of the terms or provisions of a contract after the same has been executed.

I am, therefore, of the opinion that such a provision in the specifications, although properly embodied in the contract, does not give the Commissioner authority to alter, change or modify the original contract by extending the time for completion of the work therein contained, without first obtaining a council order authorizing the Commissioner to make such extension.

Yours respectfully,

P. W. SULLIVAN,
Assistant Corporation Counsel.

Approved:

W. H. SEXTON,
Corporation Counsel.

P. S. We return herewith the specifications and proposals transmitted with your letter.

JULY 18, 1911.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

We have received your letter of the 12th inst. in the above matter, to which is attached a copy of the letter you have received from the Acting Secretary of War.

You call our attention to the fact that "The War Department, while not approving the plans, do not disapprove," and you ask us to advise you whether, "It is safe to proceed

on the assumption that no objection will be interposed by the Federal Authorities in the absence of a specific act of the Congress."

Section 10 of the River and Harbor Act of May 3, 1899, provides:

"That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same."

This section has been considered and construed by the Supreme Court of the U. S. in the following (amongst other) cases:

Cummings v. Chicago, 188 U. S. 110.

Montgomery v. Portland, 190 U. S. 89.

North Shore Boom Co. v. Nicomen Boom Co., 212 U. S. 406.

In the first two of these cases, it was decided that the requirement that the obstruction must be affirmatively authorized by Congress did not amount to such an assumption of exclusive jurisdiction or control by Congress as to prevent the State from also making its consent a condition precedent to the construction of such obstruction. When the State, or the City of Chicago, acting under authority delegated by the State, had so legislated, it was held that the consent both of the officer appointed by Congress and of the officer appointed by the State or the City was necessary before the obstruction could be constructed.

It will be noted that while the Statute requires that the obstruction must be affirmatively authorized by Congress, it gives the Secretary of War authority to authorize it on behalf of Congress. In the recent case of *North Shore Boom Company v. Nicomen Boom Company*, cited above, both parties had obtained from the Secretary of War an authority practically identical with that which has been obtained in the present case; and it was assumed, as a matter of course, both in the argument and in the opinion, that this was sufficient so far as regarded the consent of Congress.

The Statute, as construed by the Department, does not empower the Secretary to approve plans. It empowers the Chief of Engineers to recommend plans; and on such recommendation the Secretary is empowered to authorize the obstruction.

We, therefore, answer your question by saying that it is safe for you to proceed on the assumption that no objection will be interposed by the Federal Authorities in the absence of a specific act of Congress.

Yours respectfully,

WILLIAM DILLON,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JULY 19, 1911.

HON. WILLIAM SHUFELT, Chairman, Streets and Alleys South.

Dear Sir:

We have your request for an opinion as to whether the city has the right to charge Louis M. Stumer, Benjamin J. Rosenthal and Louis Eckstein compensation for the use of the space under the sidewalk at the northwest corner of Monroe and State streets, under which space it is proposed to construct a vault.

Our investigation shows that the said property is located in what is described as the School Section Addition to Chicago. The plat of the School Section Addition was before our Supreme Court in the case of *Sanitary District v. Pittsburg Ft.*

Wayne & Chicago Railway Company, 216 Ill. 575, and it was there held that the plat of the said School Section Addition not having been executed according to the statute then in force, amounted merely to a common law dedication and that the abutting owners took the fee to the center of the streets marked thereon. (*Sears v. City of Chicago*, 247 Ill. 218.)

The difference between a statutory dedication and a common law dedication is that the former vests the legal title to the grounds set apart for public purposes in the municipal corporation, while the latter leaves the legal title in the original owner. (*Ryerson v. City of Chicago*, 247 Ill. 185.)

The abutting property owner of the northwest corner of Monroe and State streets, therefore, owns the fee of the street to the center line thereof, and an abutting owner who owns the fee to the center of the street, has the right to make any reasonable use of the ground which does not interfere with the full enjoyment of the easement which is held by the city for the use of the public, and he cannot be compelled to pay the city compensation for such use.

In the consideration of this subject, however, another phase of the question presents itself, namely, under what circumstances a permit to use the space under the streets should be issued. Although the recent decisions of the Supreme Court declare that where the City does not own the fee in the street it can not charge compensation for the use of the space under the sidewalks, they also specifically declare that where the fee in the street is in the abutting owners, the said abutting owners may make only such use of the sub-sidewalk space as is *not inconsistent* with the public easement in the street.

In the *Sears* case, above cited, the court says:

“Whatever title a city has in its streets whether it owns the fee or only an easement, is held in trust for the public, and the interest of the public must always be paramount to all other interests.

A city cannot grant away the rights of the public in its streets, nor can they be encroached upon by private individuals, *with or without the consent of the municipality*, to the detriment of the public.”

Great care, therefore, should be manifested in the granting of permits. *It is not compulsory* upon the City to issue

permits to any person or corporation for the use of space under the streets. Neither is it lawful for the City to grant away the rights of the public in its streets when such a grant or permission would be detrimental to the interests of the public. Anent this question we have in mind particularly, the proposed construction by the City of a subway.

The proposed ordinance for the granting of a permit to the parties herein described would permit the construction of seven caissons in Monroe street and seven caissons in State street, which would extend in height not more than 17 feet, 6 inches below city datum and extend to hard pan.

It is apparent that such a construction at such a depth might be detrimental to the public. We do not say it would be detrimental, but we suggest the possibility of such a contingency arising in the construction of a subway.

We are of the opinion, therefore, that no permit should be issued to the said parties granting the rights described in the enclosed ordinance without a most careful consideration of all the questions involved.

Respectfully yours,

EDWARD T. WADE,

Assistant Corporation Counsel.

Approved:

W. H. SEXTON,

Corporation Counsel.

JULY 20, 1911.

MR. WILLIAM LIPPS, Chairman, Committee on Buildings.

Dear Sir:

I have the letter of Hon. Carter H. Harrison, Mayor, transmitting the letter of Thomas S. Crowe, County Physician; *in re* an ordinance compelling the owners of buildings to equip the same with screens.

I have carefully examined the question, whether such an ordinance would be within the power of the City Council to pass.

I have also, through the kindness of the City Statistician and the Health Department, examined ordinances of other cities on this subject. It appears that no city has as yet gone

to this extent in the campaign against the spreading of disease by the fly. Most progressive cities now have ordinances providing for screening manure boxes and cess pools, etc., but none as yet for windows of dwellings.

The first question in the consideration of the legality of the proposed ordinance is, what is the object hoped to be attained?

From the literature of the Health Department and the letter of the County Physician, I gather that the screening of windows of buildings is intended to prevent the admission of flies on the theory that the fly is a great spreader of contagious disease and that by preventing the admission of flies to the building, much disease might in this manner be prevented.

The nearest parallel to the legislation here proposed is found in the attempt of the City to enforce vaccination under the legislative grant "to make all acts and regulations which may be necessary or expedient for the promotion of health and suppression of disease."

A number of authorities in this State declare that such regulation is beyond the power of the Legislature or the City Council.

In *People v. Board of Education*, 234 Ill. 422, holding invalid an ordinance of the City of Chicago, passed March 20, 1905, requiring vaccination before admission to a school, the court says:

"The general police powers above enumerated to pass ordinances and make regulations for the promotion of health or suppression of disease do not include the passage of such ordinance as this, which makes vaccination a condition precedent to the right to an education. An ordinance passed by reason of such authority must be reasonable in its character and rest upon the ground that it is a necessary means of preserving the public health."

* * * * *

"There is nothing in the nature of an emergency in the occasional recurrence of the well known disease of small-pox in a city like Chicago which may not be provided for by general rules and regulations prescribed by the legislative authority of the city. The Board of Education, which has charge of the public schools, has made

no rule or regulation on the subject of such epidemics, and neither has the city council. The answer does not make known any ordinance, rule or regulation for the exclusion from the schools of children not vaccinated in the event that an epidemic of small-pox exists in the vicinity of a school or is reasonably apprehended, and in our opinion the court erred in overruling the demurrer."

In *Potts v. Breen*, 167 Ill. 67, holding invalid a rule of the State Board of Health requiring evidence of vaccination before admission to any public school in the state, the court at page 74 says:

"The power to compel vaccination, or to require it as a condition precedent to the exercise of some right or privilege guaranteed to the citizens by public law, can be derived from no other source than the general police power of the State, and can be justified upon no other ground than as a necessary means of preserving the public health. *Without the necessity or reasonable grounds upon which to conclude that such necessity exists, the power does not exist.*" (Italics are ours.)

In *Pierce v. Dillingham*, 203 Ill. 148, the State Board of Health was vested with power to compel cattle, imported from other states to be tested with tuberculin whenever the Governor should issue a proclamation that certain diseases have become epidemic in certain localities and scheduling the localities.

In passing upon a proclamation of the Governor made under this Act the court says:

"Legislation having for its object the limitation and stamping out, as far as human precautions can, infectious diseases of man or beast is of vital importance, not only because of the salutary results sought to be gained thereby, but also because the means to be employed must generally involve an infringement of personal liberty or interference with private property, and when such is the case, the provisions of the law under which it is claimed such rights of interference are conferred demand a most careful consideration. 'Where such right is claimed, it must appear very clearly and satisfactorily not only that it has been conferred by law, but also that in its exercise the facts were present which justified it. The validity of the law is not so much in question as the right to enforce its provisions. Certainly no power should be implied from an act which is not necessary to its due execu-

tion, and where the liberty and property of persons are sought to be brought within its operation the case must be clearly seen to be within those intended to be reached."

In my opinion before any ordinance compelling the owners of buildings to equip the same with screens could be sustained, it would have to be shown that it is not an experimental ordinance and reasonably certain to prevent the spread of disease definitely attributable to the fly.

No epidemic is now raging in Chicago which can be directly chargeable to the fly. Isolated cases of diseases contracted through flies will not justify the passage of this ordinance any more than the existence of isolated cases of small-pox justify a general vaccination ordinance. There must be some element of contagion and something of the magnitude of an epidemic before the police power can be called into operation to the extent of compelling buildings to be equipped with screens.

I do not believe such conditions can be said to be present in Chicago and for that reason the proposed ordinance is too drastic, is not reasonable and cannot be sustained under any grant of power to the City.

Respectfully submitted,

GEO. L. REKER,

Assistant Corporation Counsel.

Approved:

W. H. SEXTON,

Corporation Counsel.

JULY 21, 1911.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Your communication of the 20th inst. addressed to the Corporation Counsel with attached memorandum of ordinances received from the City Comptroller, has been turned over to me for consideration.

You state that the new Inspectors of the House of Correction appointed by you at the meeting of the city council of Monday last failed to submit bonds to the city council, and inquire whether by reason of such failure the said appointees regularly hold their positions.

By Section 2 of "an Act to establish Houses of Correction and authorizing the confinement of convicted persons therein", approved April 25, 1871 (Hurd's Rev. Stat. 1908, p. 1175, provides that houses of correction in cities shall be managed by a board of inspectors one of whom shall be the Mayor of the city and the three other members shall be appointed by him with the advice and consent of the legislative authority of the city. Section 2 further prescribes the terms of office of the appointed members of the board.

Section 17 of the same act reads as follows:

"The inspectors of any such house of correction and the superintendent thereof shall, before entering upon the duties of their respective offices, take and subscribe the usual oath of office. *Said inspectors and superintendent shall severally give bond to such city with sureties and in a penal sum such as may be required by the legislative authority thereof for the faithful performance of their duties.*"

Section 1496 of the Chicago Code of 1911 which is found in Chapter 39 of said Code is in the following language:

"The superintendent and the inspectors of the house of correction shall severally, before entering upon the duties of their respective offices execute bonds to the City of Chicago in the penal sum of Five Thousand (\$5,000) dollars each with such sureties as the city council shall approve, conditioned for the faithful performance of the duties of their respective offices."

It appearing, then, that no attempt was made by the three appointees to comply with the provisions of the statute or city Code relating to official bonds to be given by inspectors of the house of correction, what is the legal status of these inspectors; are they officers *de jure* or merely officers *de facto*?

The answer to this question depends on whether the statutory provision in question is to be construed as mandatory or directory.

It is true there is a conflict in the authorities and in some States it is held that statutes directing the execution or filing of official bonds within a specific time are mandatory and compliance therewith a condition precedent to obtaining

a title to the office in question; but in most jurisdictions, and this includes Illinois, it is held that statutes or ordinances requiring official bonds to be filed within a certain designated time are merely directory and not mandatory.

City of Chicago v. Gage, et al., 95 Ill. 593, 621-23.

Cawley et al. v. People, 95 Ill. 249, 253.

Massey v. People, 201 Ill. 409, 413.

Launtz v. People, 113 Ill. 137, 144.

Glavey v. United States, 182 U. S. 595, 604.

Miller v. United States, 103 Fed. 413, 415.

In re Supervisors, etc., 215 Pa. 119.

Board of Commissioners v. Johnson, 124 Ind. 125; 7 L. R. A. 684, 686.

City of Houston v. Estes, 79 S. W. 848.

City of Houston v. Clark, 80 *id.* 1198.

Foot v. Stiles, 57 N. Y. 399, 402.

Cronin v. Stoddard, 97 N. Y. 271, 274.

Sprowl v. Lawrence, 33 Ala. 674, 699.

State v. Colvig, 15 Oregon 57, 62.

State v. Peck, 30 La. Ann. 280.

Pickering v. Dat, 2 Del. Ch. 333, 382.

In *Glavey v. United States*, 182 U. S. 595, 604, Mr. Justice Harlan said:

“In view of the former decisions of this court it cannot be declared that the execution by Glavey of the bond required by the Act of 1882 was a condition precedent to his right to exercise the functions of the office to which he was appointed. His appointment was complete at least when he took the required oath and transmitted evidence of that fact to the secretary.”

In *Foot v. Stiles*, 57 N. Y. 399, 402, it was held that the omission of an officer to file any legal bond as required by statute, does not cause the office to become, *ipso facto*, vacant, nor is he merely an officer *de facto*, but on the contrary he holds his office by a defeasible title and is rightfully in office until in a direct proceeding a forfeiture is judicially declared against him. The court there said (p. 403):

“The acts are in all respects lawful until the State interferes in a proceeding of the nature of a *quo warranto*. It only tends to confusion to style him an officer

de facto whose acts are only valid as to the public and third persons and cannot be sustained as to himself."

In *City of Chicago v. Gage*, 95 Ill. 596, 621-23, the court construed a statute providing that upon the failure to file a bond within the time designated the person chosen should "be deemed to have refused said office and the same is filled by appointment." But it was held that such statute was merely directory, and a default in filing a bond might be waived, and the title to the office is derived from the election to office or appointment as the case may be.

In *Booker v. Donohue*, 95 Va. 359, 367, it is held, without qualification, that the taking of an oath or the execution of a bond by an officer as prescribed by law is not a condition precedent to his becoming an officer *de jure*.

See also—

People v. Crissey, 91 N. Y. 636-7.

I have given due attention to the decision of the Supreme Court in the case of *Chicago v. Burke*, 226 Ill. 191, and the other Illinois cases there cited. Some of the language used in the Burke case might be construed as contrary to the cases above cited and quoted. The Burke case did not turn upon any such question as is here under consideration and when carefully read will be found not in conflict with the authorities above cited. This statement also applies to the other Illinois cases there cited.

My conclusion is, then, that the three new Inspectors of the House of Correction, assuming that they were legally appointed to office, are more than officers *de facto* and hold a legal title to their offices which can only be questioned in *quo warranto* proceedings, or by steps taken for their removal because of failure to comply with the directions of the statute and ordinances as to executing their official bonds.

The officers can be required to file their bonds when the city council convenes in the fall.

Yours very truly,

MACLAY HOYNE,

First Assistant Corporation Counsel.

Approved:

W. H. SEXTON,

Corporation Counsel.

JULY 24, 1911.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Referring to your request for an opinion as to the character, legal or otherwise, of a slot machine in the saloon of Clarence Green in Dearborn street just north of the Cort theater, and as to whether a machine of such character is permissible under the city ordinances, I beg to say:

The machine in question, according to the attached memorandum, appears to be a "Mills Vending Machine", which is a card machine, and wherein a person, by dropping a nickel and pressing a lever, causes certain hands of cards to be displayed and a payment is made according to the value of the hands, such payment being in checks good in trade.

Section 180 of Chapter 38, Hurd's Revised Statutes of 1909, page 786, provides as follows:

"SETTING UP OF.) Whoever sets up or promotes any lottery for money, or by way of lottery disposes of any property of value, real or personal, or under pretense of a sale, gift or delivery of any other property, or any right, privilege or thing whatever, disposes of, or offers or attempts to dispose of any real or personal property with intent to make the disposal of such real or personal property dependent upon or connected with any chance by dice, lot, numbers, game, hazard or other gambling device, whereby such chance or device is made an additional inducement to the disposal or sale of said property, and whoever aids, either by printing or writing, or is in any way concerned in the setting up, managing or drawing of any such lottery, or in such disposal, or offer or attempt to dispose of property by any such chance or device, shall, for each offense, be fined not exceeding \$2,000."

Sections 985 and 986 of The Chicago Code of 1911, provide among other things, as follows:

(Paragraph 6, Section 986) "No person shall either publicly or privately, as owner or agent, establish, open, set on foot, carry on, promote, make, draw, or act as 'backer' or 'vender' for or on account of, any lottery, policy or scheme of chance of any kind or description by whatever name, style or title the same may be denominated or known, whether located or to be drawn, paid or carried on within or without the limits of the city, and

whether such drawings be real or imaginary, and no person shall be in any way concerned in any such lottery, policy or scheme of chance as aforesaid."

The controlling question involved in your inquiry is whether a person operating a vending machine like the one in question can be brought within the purview of the ordinance as carrying on a scheme of chance of any kind or description.

A lottery has been defined by the Supreme Court of Illinois as a scheme for the distribution of prizes by chance.

Dunn v. People, 40 Ill. 465;

Thomas v. People, 59 Ill. 160;

Elder v. Chapman, 176 Ill. 150.

In New York, the Supreme Court of that state in *People v. Noelke*, 94 N. Y. 137, has said:

"The word 'lottery' has no technical meaning. A lottery is nothing more or less than a scheme or device of chance."

It is said in *People v. Elliott*, 2 L. R. A. 403, that a lottery is a scheme by which a result is reached by some action or means taken in which man's choice or will has no part and which human reason, foresight, sagacity or design cannot enable him to know or determine until the same has been accomplished.

I assume, for the purpose of this opinion, that the checks which the person playing the machine obtains, differ in value according to the hands which are disclosed after dropping the nickel. It is probable that the value of the nickel in trade is given in any event, but that upon a more fortunate occurrence of a hand of cards, a ticket calling for goods in excess of the value of the nickel is won by the player. Such a device would give the player of the machine the value of his nickel in any event, but would also give him a chance, by a fortunate coup, of winning a larger amount. The question is not whether he is in any event getting his money's worth, but whether the element of chance enters into the game.

In *Thomas v. People*, *supra*, in regard to a scheme wherein an admission fee of \$5.00 was charged to a series of concerts

and lectures, and in addition, the holder thereof was entitled to a chance to obtain an additional prize, the court say:

“Even if the ticket to the concert and lectures and engraving were intrinsically worth the price paid for the ticket the scheme would still be a lottery.”

That each person gets the value of his money does not prevent the transaction from being a lottery is also held in

U. S. v. Olney, 1 Abbott U. S. 275;

Taylor v. Smetten, 11 Q. B. D. 207;

Reg. C. Harris, 10 Ox. Cr. Cas. 352;

Am. Art. Union v. State, 7 N. Y. 288.

In *Davenport v. City of Ottawa*, 54 Kas. 711, a merchant exhibited in his window a box containing \$25.00, and advertised that with each purchase of goods of the value of fifty cents or more, a key would be given and that the purchaser holding the key that would unlock the box would be entitled to the contents. A ticket containing the offer was attached to each key. All goods were sold at regular prices and no other consideration was required of the purchaser. In sustaining a conviction against the proprietor of this scheme, the court held that it constituted a lottery.

In *People ex rel. v. Lavin*, 66 L. R. A. 601 (N. Y.), the purchaser of a certain cigar was given the privilege of guessing as to how many cigars the United States collected a tax upon during the year, and the one making the correct guess was given a prize. The court say:

“We think the distribution in this case is controlled by chance within the meaning of the statute and that, therefore, it is illegal. The scheme certainly falls within the requisites of a lottery as defined by the Supreme Court of United States in *The Public Clearing House* case (194 U. S. 497) under a statute similar to our own. (Illinois.)”

Different forms of lottery called “gift sales”, “premium sales” or “prize sales” have been admitted in

Commonwealth v. Thatcher, 97 Mass. 583;

Commonwealth v. Emerson, 165 Mass. 146;

Hudelson v. State, 94 Ind. 426;

Bell v. State, 37 Tenn. 507;

Eubanks v. State, 50 Tenn. 488;

New Orleans v. Collins, 52 La. Annual 973.

State v. Clarke, 33 N. H. 329;

State v. Short, 32 N. J. Law 398.

Almost identical cases are those of *Loiseau v. State*, 114 La. 34, where the defendant kept a slot machine in which customers deposited nickels, and the owner gave a five cent cigar for each nickel deposited. The machine showed a number of cards constituting a "hand", and the person drawing the highest "hand" received all the cigars. This was held a gambling device.

Also, in *Meyer v. State*, 112 Ga. 20, the defendant, a cigar dealer, operated a "nickel slot trade machine." The machine was operated by placing a nickel in the slot, which caused a wheel within the machine to revolve and exhibit a number of cards constituting a "hand". The person depositing the nickel was entitled to a cigar, or package of chewing gum, each valued at five cents, and in addition thereto a prize according to the "hand" displayed. It was held that the operation of such a machine was a violation of the penal code, Section 407, in respect to lotteries.

The machine in question, I conclude, constitutes such a scheme as would attract purchasers by holding out a greater gain than represented by the value of the coin placed in the machine, by the action, or through the result of mere chance. One of the incentives to play the game is the hope of receiving from the machine more in value than is placed therein, and it is against this very incentive of obtaining something by mere chance that our statute and ordinance, hereinabove quoted, are directed. In short, the element of obtaining by chance a thing of greater value than the player has paid for, constitutes the essential feature of gambling.

I am, therefore, of the opinion that the device in question is not permissible under the city ordinances.

I may add that an opinion in conformity herewith has heretofore been rendered by this department. (Opinions of the Corporation Counsel, Tolman's compilation, page 555, *et seq.*)

Yours respectfully,
JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:
WILLIAM H. SEXTON,
Corporation Counsel.

JULY 26, 1911.

THOMAS G. PIHLFELDT, Esq., Engineer in charge of Bridges.

Dear Sir:

Your request, as above, of the 14th inst., to which are attached letter of Assistant Harbor Engineer and Plat of Survey, is best answered in the words of the statute, which grants to the City Council the power to deepen, widen, dock, cover, wall, alter or change the channel of water courses. (Subdivision 30, Sec. 1, Art. V of the Cities and Villages Act.)

Subdivision 53 of Sec. 8, Chapter 4, of the Act of Feb. 13, 1863, declares that "the harbor of the city shall include the piers and so much of Lake Michigan as lies within the distance of one mile into the lake, and the Chicago River and its branches to their respective sources", and the city was empowered, among other things, "to preserve the harbor", and "to prevent and remove all obstructions therein."

Subdivision 2 of the same section empowered the city, "to remove and prevent all obstructions in the waters, which are public highways of said city, and to widen, straighten and deepen the same."

Investigation of the *Locus in quo* discloses the following facts:

1. The land across which the proposed dock line runs is submerged.
2. No dock line was ever established at the point in question.
3. The submerged land is included in the Subdivision of Lots 1 and 2 of Block 8, of Sheffield's Addition to Chicago, which was recorded in the Recorder's Office of Cook County, June 29, 1865.
4. Taxes have been and are levied and paid on the land sought to be included in the proposed dock line.
5. No wharf, pier, dock or other structure is upon the land within the proposed dock line.

The power of the city to widen the channel of the river when exercised solely in the interest of navigation can, ordinarily, not be questioned by abutting property owners.

Under the law of this State, however, the owner of lots on the banks of the river also owns the bed of the stream to its

center, subject only to the public right of navigation, but he cannot erect docks, piers or wharves beyond the point of navigability.

Chicago v. Laflin, 49 Ill. 172.

Washington Ice Co. v. Shortall, 101 Ill. 52.

Chicago v. Van Ingen, 152 Ill. 624.

Ballance v. City of Peoria, 180 Ill. 29.

Beidler v. Sanitary District, 211 Ill. 628.

Yates v. Milwaukee, 77 U. S. 497.

In the latter case, the City of Milwaukee, under a power derived by legislative act, "to establish dock and wharf lines upon the banks of the Milwaukee and Menomonee Rivers, restrain and prevent encroachments, etc.," sought to declare a wharf erected by Yates a nuisance. There the court held:

"This riparian right is property, and is valuable; and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law and if necessary that it be taken for the public good, upon due compensation."

"It is true that it is said in argument that the City Council has established a wharf and dock line * * * and that Yates' dock projects beyond that line."

"No such defense is set up in the answer and the existence of such a line * * * cannot be taken into account here * * *"

"But however this may be, we are of the opinion that the City of Milwaukee cannot, by creating a mere artificial and imaginary dock line hundreds of feet away from the navigated part of the river and without making the river navigable up to that line, deprive riparian owners of the right to avail themselves of the advantages of the navigable channel by building wharves and docks to it for that purpose."

In the case of *Chicago v. Van Ingen*, *supra*, the City had granted to the riparian owner a permit to build a dock in front of his land upon a line indicated in appellee's map as the "permit dock line", which cut off about 20 feet of his land on the river front. After appellee had done considerable work he was stopped by the City. He filed a bill for an injunction which was granted and later on made perpetual. On

appeal by the city the decree was sustained. In this case the Supreme Court, after reaffirming its former decisions on the rights of riparian owners, say :

"No question as to the right of the city to establish a dock line at the place here contended for and widen the channel of the river so as to take in the intervening land, under the general powers granted in the Cities and Villages Act * * * without making just compensation to appellee, is presented upon this record. No attempt was made on the part of the city to establish a dock line at the place in question, by ordinance or otherwise. *But it may be said that riparian rights are property protected by law. * * * In respect to such rights, as in all cases where property is sought to be taken for public use, the owner cannot be divested thereof without just compensation being first made.*" (Page 635.)

In the case of *Beidler v. Sanitary District, supra*, the right of a riparian owner to use the water in the stream was upheld, and owners of property abutting on the canals there constructed were awarded damages against the Sanitary District for having lowered the flow of water into their slips.

In the case of *Ballance v. Peoria, supra*, it was claimed that the grant of the legislature to construct a bridge across the Illinois river impliedly empowered the bridge association to take and use private property in the construction and operation of the bridge without making compensation therefor.

Here the Court say :

"But conceding that there was an implied power vested in the bridge association to take such property as might be necessary to be used in the construction of the bridge across the river, that power could not be exercised unless the bridge association first made compensation to the owner of the property sought to be taken, because the private property of an owner cannot be taken for a public use unless just compensation is made. * * * It is immaterial whether the property be on the bank of the river or forty feet below the water's edge * * *."

"If the city has the right to control and use the river and the soil covered by it for the width of the street, as a riparian owner, subject to the easement in the public for the purposes of navigation, a lot owner bordering on the river has the same right, and if clothed with that prop-

erty, his property, although it may be submerged lands, cannot be taken without just compensation."

In *Chicago & Pacific Railroad Co. v. Stein et al.*, 75 Ill. 41, where the property of a riparian owner on the north branch of the river was damaged by the erection of a pier in the river the Court say:

"It is clear that appellees were the owners of the lots fronting upon the river to the center of the current, subject only to the right of the public to the free and undisturbed navigation of the river. The State could not take or damage appellee's property fronting upon or in the bed of the river without first making compensation therefor, nor could it by granting a charter to appellant authorize appellant to do what it could not, in its sovereign capacity do itself."

See also, *Chicago v. Norton Milling Co.*, 196 Ill. 580.

"Private property shall not be taken or damaged for public use without just compensation."

Const. 1870, Art. 2, section 13.

From the foregoing it would seem to appear that the power of the city, when exercised solely with an intention to improve the river as a public navigable highway, cannot be questioned.

If the channel is navigable up to the proposed dock line an appropriate ordinance which establishes such line, is a public declaration to the riparian owner that in erecting any structure upon his land he may not go beyond the line so established.

If, as in the *Yates* case, the owner has constructed a wharf which lies within the proposed dock line, he cannot be deprived of its use without compensation. In that case the Supreme Court of the United States say:

"If the authorities of the City of Milwaukee deem its removal necessary in the prosecution of any general scheme of widening the channel and improving the navigation of the Milwaukee River. they must first make him compensation for his property so taken for the public use."

Yates v. Milwaukee, *supra*.

If the river is not navigable within the proposed dock line, or if it cannot be claimed that this land is practically

an obstruction to the proper navigation of the present navigable channel and as such, a nuisance that may and should be removed, it is my opinion that the City, while it may pass an ordinance by which the proposed dock line is established, cannot appropriate the land in question for public use without first making just compensation to the owner or owners.

A right of user by prescription can hardly be presumed in this case where it appears that taxes have continued to be levied and paid upon the property. However, before a riparian owner may erect upon his land any wharf, dock or pier, or drive any piles, he is required to make application to the Commissioner of Public Works who in the absence of an ordinance, may reasonably fix a line beyond which no structure may be erected; and the acceptance of a permit issued pursuant to such application establishes the dock line as to such owner. (Mun. Code, 1905, Secs. 997, 998, 999.)

Chicago v. Van Ingen, supra.

In the foregoing opinion this department has adhered strictly to the law governing cases of this nature. It is for your department in such case to solve questions of fact and act accordingly.

Respectfully submitted,

NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,
Corporation Counsel.

P. S. Enclosures returned: Letter of Assistant Harbor Engineer—Plat of Survey.

JULY 27, 1911.

HON. J. LINDHEIMER, Assistant Treasurer of the City of Chicago.

Dear Sir:

I have your communication of recent date wherein you request an opinion of this department in relation to certain matters, which may be stated as follows:

First: Is the City Treasurer required by law to hold all school funds as a special fund separate and uncommingled

with the other moneys in his charge, subject to the order of the Board of Education of the City of Chicago; and

Second: Has the City Council of the City of Chicago any power or authority to designate depositories, wherein the school funds held by the City Treasurer shall be placed?

First: In regard to the first inquiry there can be, in my opinion, but little doubt involved in its proper solution.

Section 137 of an act of June 12th, 1909, Chapter 122, entitled "Schools," Hurd's Revised Statutes 1909, page 2018, provides as follows:

"All moneys raised by taxation for school purposes or received from the State common school fund, or from any other source for school purposes, shall be held by the city treasurer as a special fund for school purposes, subject to the order of the Board of Education, upon warrants to be countersigned by the Mayor and City Comptroller or, if there be no City Comptroller, by the City Clerk."

Section 139 of the act provides as follows:

"All schools in such cities shall be governed as herein provided and no power given to the board of education shall be exercised by the city council of such cities."

In regard to the powers of the board with or without the concurrence of the City Council, the following provisions are made (Section 132, p. 2016):

"The board of education shall have charge and control of the public schools in such cities, and shall have power with the concurrence of the city council;

First—To erect or purchase buildings suitable for school houses, and keep the same in repair.

Second—To buy or lease sites for school houses with the necessary grounds. If the board of education shall be unable to agree with the owner or owners for the purchase of such site, then, with the concurrence of the City Council, it may require the title to such site in the manner provided by law for the exercise of the right of eminent domain. Such proceedings to condemn shall be in the name of the city in trust for the use of schools.

Third—To issue bonds for the purpose of building, furnishing and repairing school houses, for purchasing school sites, and to provide for the payment of such bonds; and to borrow money for school purposes upon the credit of the city."

Section 133, reads as follows:

“The said board of education shall have power

First—To furnish schools with the necessary fixtures, furniture and apparatus.

Second—To maintain, support and establish schools and supply from taxes the inadequacy of the school funds for the salaries of the teachers.

Third—To hire buildings or rooms for the use of the board or of schools.

Fourth—To employ teachers and fix the amount of their compensation.

Fifth—To prescribe the school books to be used, and the studies in the different schools.

Sixth—To divide the city into school districts, and to alter them and create new ones as circumstances may require, and generally to have and possess all the rights, powers and authority required for the proper management of schools, with power to enact such ordinances as may be deemed necessary and expedient for such purpose.

Seventh—To expel any pupil guilty of gross disobedience or misconduct.

Eighth—To dismiss and remove any teacher for cause in the manner provided in section 161 of this act.

Ninth—To apportion the pupils to the several schools.

Tenth—To lease school property and to lend moneys belonging to the school fund.

Eleventh—To grant the use of assembly halls and class rooms when not otherwise needed, including light, heat and attendants, for public lectures, concerts and other educational and social interests, free of cost, but under such provisions and control as they may see fit to impose.”

It will be seen from an examination of the above powers that the statute is silent with respect to the control to be exercised by the board of education over school funds, except as such power may be conferred by section 137, *supra*, and is likewise silent, except in the section above noted, as to the manner in which the treasurer shall manage and control the custody of such fund.

The words in the section, however, “all moneys * * * shall be held by the city treasurer as a special fund for school purposes,” leave no doubt in my mind that the duties imposed

upon him to keep such fund separate and distinct from other corporate funds in his possession prohibits him from commingling the funds with any others of which he may be the custodian.

The school fund in the treasurer's possession may be said to be a portion of the revenue (from whatever source derived) set apart or pledged to the payment of all particular debts, obligations or charges, and in this case is the foundation by means of which the expenses and credits of the school system within the City of Chicago are supported. (20 Cyc. 858.)

The use of the words "special fund for school purposes" excludes any idea that these funds shall be a part of the general corporate fund of the city.

It is fundamental law that special funds must be kept separate and intact and not commingled with other funds of the custodian, and any such custodian so commingling said funds does so at his peril and will be held liable in case of loss to the owner by such commingling. The principle has been frequently applied in cases of executors, trustees and others occupying a fiduciary capacity, and a citation of authorities on this point would be superfluous.

I, therefore, conclude that the school funds in the Treasurer's hands must be kept separate and apart from the general and corporation funds in his hands, entered upon his books as such, and that his books should show at all times his accounts in regard to such funds separately from any other funds of which he may have possession.

Second: Section 5 of Article XII of the amendment to the city charter of May 18, 1905, Hurd's Revised Statutes of 1909, page 364, provides as follows:

"It shall be the duty of the comptroller at least once in each year and not later than the first day of December of each year, to advertise for bids from all regularly established national and State banks doing business within the city, for interest upon the money of the city so to be deposited in such banks. Such bids shall be reported to the City Council for its information and consideration not later than the fifteenth day of December of each year, to the end that an award or awards may be made upon such bids by the City Council prior to the end of each fiscal year. Such awards shall be made to the highest

and best responsible bidder or bidders. The City Council shall have the power to reject all bids and to designate as many depositaries as it deems necessary for the protection of the city's interests and award bids accordingly. No bids shall be awarded to any financial institution other than a regularly organized state or national bank, and no moneys shall be deposited with any bank or such award be effective until such depositary shall have delivered to the comptroller a bond to the city in such sum and with such sureties as the City Council shall approve, conditioned in like manner as other official bonds given by public officials charged with the custody of money. The City Council shall have power to pass all necessary ordinances to carry the foregoing provisions into effect and provide rules applicable thereto. The city treasurer shall be discharged from responsibility for all moneys deposited by him pursuant to order or ordinance of the City Council with any depositaries who may be so named and qualified, and in fixing the amount of the bond of the city treasurer due regard shall be had by the City Council of the effect of any such deposits upon the actual amount of money for which the city treasurer may from time to time be held responsible. * * *

The question arises whether the school fund in the hands of the Treasurer is subject to the order of the Council, as provided by the foregoing section, in making deposits of school moneys.

I again call your attention to the language of section 137 of the School Act, above quoted, that all moneys shall be held by the City Treasurer as a special fund, etc. We must look to the proper interpretation given to the word "held". Does it mean that it shall be held by him without any interference from any person, subject to call by draft of the Board of Education properly countersigned? Or, does it mean that it shall be held subject to supervision and direction on the part of the City Council? I am inclined to the former view.

The word "held" implies a defensive possession entirely consistent with that of a trustee.

Gutch v. Fosdick, 48 N. J. Eq. 353.

As bearing upon the exclusive dominion of the Treasurer over the fund, the meaning of the word "held" has been considered in *Witsell v. City of Charleston*, 7 S. C. 88, 89. The court say:

“As a technical term, ‘held’ embraces two ideas—that of actual possession of some subject of dominion or property, and that of being invested with legal title or right to hold or claim such possession.”

The idea of exclusive control of the fund, implied by the use of the word “held”, is strengthened by the following words: “as a special fund,” etc. If the Treasurer were to hold the school funds as a special fund, subject to the one condition of their draft by the school authorities, and likewise be subject to the order and direction of the City Council, in my opinion, an anomalous state of affairs would arise.

To cite merely one instance: The word “held” undoubtedly implies that the character of the custody, which is imposed upon the Treasurer, is that of a guarantor of the safety of this fund. In other words, that he is responsible to the owner for its forthcoming upon demand, absolutely, and nothing, not even the utmost diligence in its preservation on his part, will excuse him in the event he is unable to produce the fund when called upon. Such strict accountability to the owner of the fund is entirely inconsistent with his obligation if he were subjected to the control of the City Council.

Section 5 of the amended charter, above quoted, provides that the Treasurer shall be discharged from responsibility for all moneys deposited by him pursuant to order or ordinance of the City Council with any depositary who may be so named and qualified, and this provision is irreconcilable with the strict accountability which the State law imposes upon him. In case of the demand upon the City Treasurer by the Board of Education for moneys in his possession, he must produce the money demanded and nothing will avail himself as an excuse. Such is his responsibility as guarantor according to the statute. If he obeys the City Council and deposits the money in a bank designated by the Council and that bank should become insolvent and the owner’s (the Schools) money be lost, he would have a complete defense to an action by the Board of Education against him for the money, provided if he held that in the custody of school funds he can be controlled by the Council. Such is the inconsistency which would arise if the Treasurer were at one and the same

time a guarantor to the Board of Education of the safety of the school fund, and also subject to dictation by the City Council as to the disposition of said fund.

Where there are two possible constructions to be given to the duties of a fiduciary officer, the law invariably follows the construction imposing the more strict guardianship of funds entrusted to his charge.

Aside from the fact that the provision of the Cities and Villages Act and the School Act imposes different degrees of liability upon the Treasurer, in my opinion, the trend of decision in this State has been to regard the Board of Education as a somewhat separate and distinct political entity from the City of Chicago.

The Board of Education of the City of Chicago is a public corporation, created by legislative authority as an agent of the State for the purpose of maintaining public schools and school buildings within that subdivision of the State. For the purposes of that function it receives from the taxpayers and holds as a trustee the school fund.

Adams v. Brennan, 177 Ill. 194.

It is said in *McGurn v. the Board of Education*, 133 Ill. 122, 133:

“It thus appears that in cities of the class to which Chicago belongs, the entire supervision and control over all the public schools of the city is, by the provisions of the School Law, committed to the Board of Education of the city. This jurisdiction is necessarily exclusive.”

Speaking of the position which the Treasurer of the City of Chicago occupies with relation to his office as Treasurer of the school fund, the Supreme Court of this State in *Spaight et al. v. People ex rel. County Collector*, 87 Ill. 595, 600, say:

“The const., art. 8, sect. 1, directs that ‘the General Assembly shall provide a thorough and efficient system of free schools, whereby all children in this State may receive a good common school education.’ * * * The General Assembly, in accordance with a well settled canon of construction of legislative powers, may, therefore, act, in these respects, at its discretion, and prescribe such mode for the formation of school districts, and designate such persons for the levying, collecting and having the custody of school taxes, as it, alone, shall consider most

conducive to the public interests. * * * And although they (the School laws) may require the boundary lines of cities to be adopted as lines for the formation of school districts and that city officers shall perform the duties of school officers, yet this is for convenience only, and the districts thus to be formed, and the officers thus required to perform duties, *are to be regarded simply as agencies selected by the State to provide a system of free schools.* Although the limits and officers of the two corporations (that for strictly city purposes and that for the purpose of providing free schools) are the same, their purposes and objects are different, and they are, in fact, separate and distinct corporations. The one has its existence and is limited in the powers it may exercise by its charter, proper; the other by the school law."

From a consideration of the decisions above cited, and others, it would seem that the Treasurer of the City, while acting as a custodian of the school funds, is acting in such latter capacity as a State officer.

Fuller v. Heath, 89 Ill. 912;

San Diego v. Dauer, 32 Pac. Rep. 551;

Hill v. Boston, 122 Mass. 380.

If, in holding the school funds, the City Treasurer is to be considered a State officer, it is almost unnecessary to point out that he can not be controlled by the orders of the City Council in matters pertaining to his State duties.

That the State and not the municipality is the real directing power and trustee of all school funds within the confines of the former, is stated in *City of Chicago v. People*, 80 Ill. 384, 386. The court say:

"The State is virtually a trustee of the fund, for the use of the people, and the municipalities and officers are but the agencies employed by the State in executing the trust. * * * This being so, the State is the real owner of the fund, to be held in trust for the purposes of the grant."

It is true that there are decisions from which the inference may be drawn that the Board of Education is a body in the nature of a department of the City of Chicago; but without prolonging this opinion to an unnecessary length with a review of these cases, it will be sufficient to say that we consider the decisions holding that the school board is a distinctly

governmental instrumentality, are ones more harmonious in their trend and better supported by authority.

The cases thus referred to upholding the view we have taken, are:

School Trustees v. Douglas, 17 Ill. 211;

Glidden v. Hopkins, 47 Ill. 528;

Speight v. People, *supra*.

People v. School Trustees, 78 Ill. 140.

Fuller v. Heath, *supra*.

People v. Roche, 124 Ill. 10.

McGurn v. Board of Education, *supra*.

Cravener v. Board of Education, 133 Ill. 145.

Plummer v. Yost, 144 Ill. 74.

Smith v. People, 154 Ill. 58.

Perhaps the foremost of those cases holding the contrary view is *Brennan v. People*, 176 Ill. 620, 628; but even that case only goes so far as to hold that

“* * * if the effect of the school legislation is to confer corporate powers on the board of education or to make it a State agency for certain purposes, still the change has not been such as to disconnect it from the city government and to authorize the courts to declare that the offices and places of employment under the board are no longer offices or places of employment in or of such city.”

thus holding merely that as far as the Civil Service law is connected with the places of employment of the Board of Education it was to that extent a branch of the city government.

It is further held in this case that

“* * * it seems clear to us that the board of education of the City of Chicago is still connected with, dependent upon, and to some extent a part of, the municipal government of that city, and as such, that its offices and places of employment fall within the operation of the Civil Service Act.”

It will be noted that this is one of the early Civil Service cases, and it must be borne in mind that our Supreme Court in its eagerness to uphold the Civil Service Act in all its forms and to give expression to its purposes to the fullest extent, has not hesitated in other cases, as well as this, to announce principles which can only be sanctioned from a legal

standpoint on the theory that the end justified the means. While we do not say that had the Civil Service Act not been involved, the court would have decided this case in an opposite manner, yet we do think that the desire to uphold the Civil Service law in its inception gave a strong bias to the early decisions upon that subject.

The matter involved in this discussion is practically one of first impression and has not been exactly adjudicated upon, so far as we are aware by any decision of the Supreme Court of this State, and in view of the somewhat conflicting nature of the authorities, an opinion would be improper, to my view, which stated in too positive terms how the courts would hold the law to be upon the question. It is my impression, however, after a consideration of the authorities, the constitutional and statutory provisions, that the City Council is without power to direct the manner in which the City Treasurer, as Treasurer of the school fund, shall control or manage the fund in question.

Very respectfully yours,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JULY 29, 1911.

MR. CHAS. M. THOMSON, City Hall, Chicago.

Dear Sir:

Mr. Wm. H. Sexton has referred to me for attention your communication hereto attached, dated July 25th, 1911, wherein you request information as to the legal effect of the recent Council ordinance passed February 14th, 1911, regulating Dry Cleaning Establishments.

You state in this letter that Section IV provides that the buildings are to be of brick, stone or concrete, without basement, and not over two stories in height. This paragraph provides further that buildings not over three stories in height used for Dry Cleaning Purposes previous to the passage of the ordinance can be further maintained for this use provided they comply in other respects with the provisions of the ordi-

nance. Your interpretation of this last provision is that this exception refers only to the height of the building. This section reads as follows:

“Building Requirements—Ventilation—Equipment—Lighting—Water Trough.) Every building used or intended to be used for the purpose of conducting or carrying on the business of dry cleaning as defined in this ordinance, shall be constructed and equipped according to the following specifications:

Every such building shall be built of brick, stone or concrete, with no basement, and shall not exceed two stories in height, provided, however, that the use of any building not exceeding three (3) stories in height, in which a dry cleaning business was carried on prior to the passage of this ordinance may be continued if such building complies in all other respects with the provisions of this ordinance.”

Then follow regulations as to the height of the first floor, a provision that the floor and roof shall be of fireproof construction, provisions that there shall be no openings through the floors, provisions as to stairways, besides a number of other provisions.

My interpretation of this ordinance is that the exception that the use of any building not exceeding three stories in height, if such building complies “in all other respects with the provisions of this ordinance” does not refer only to the height of buildings, but am of the opinion that if it is desired to use a building not exceeding three stories in height for Dry Cleaning purposes such use is permissible providing all provisions of the ordinance are complied with.

In this same letter you state that one of your constituents built a one story frame structure last February which has been used ever since for Dry Cleaning purposes and you further request advice as to whether the ordinance shall be construed to apply to his building so as to cause him to discontinue using it for this purpose.

Of course it is true as a proposition of law that statutes and ordinances are to be construed prospectively unless the language of the act clearly indicates an intention that it is to operate retrospectively (*People v. Gage*, 233 Ill. 451; *Eddy v. Morgan*, 216 Ill. 448; *B. Grocer Co. v. Zelle*, 172 Ill. 414;

Marsh v. Chestnut, 14 Ill. 223); but it seems to me upon a careful reading of Section IV, the intention of the Council is plainly disclosed that this ordinance is operative upon buildings in existence at the time of the passage of the ordinance. The fact that there is an exception made in the case of buildings not exceeding three stories in height in which a Dry Cleaning business was carried on prior to the passage of this ordinance clearly shows that a retrospective effect is intended. The ordinance applies to buildings in existence at the time of the passage of same and such being the case, this ordinance covers the one story frame structure owned by your constituent above referred to.

You state in the conclusion of your letter, that you question whether the ordinance can be enforced and made retroactive with the result of placing such a building out of business entirely. This of course involves a discussion of constitutional questions which it is impossible for me to take up as fully as I would like.

There is no place in either the State or the Federal Constitution where the word "retroactive" is used. All retroactive laws are not necessarily invalid. Retroactive laws are unenforceable when they violate any provision of either the State or the Federal constitution, such as the passage of "*ex post facto*" laws, or laws impairing the obligation of contracts.

Among the powers given the City of Chicago according to the Cities and Villages act is the power contained in clause 66, chapter 24, "to regulate the police of the city or village and pass and enforce all necessary police ordinances."

The safety of life, limb and property being one of the prime objects of municipal incorporation, all appropriate regulations tending to promote this object properly come under the police power delegated to the municipality. (28 Cyc. 705, citing 2 Kent Comm. 239; *State v. McMahon*, 76 Conn. 97; *Osburn v. Chicago*, 105 Ill. App. 217.) In fact it has been expressly held that the above provisions of the general incorporation act conferring power on cities to "pass and enforce all necessary police ordinances" authorizes the passage of such ordinances as are conducive to the promotion of the comfort,

safety, health, and general welfare of the public. (*Wice v. C. & N. W. R. R.*, 193 Ill. 351.)

It is unquestioned that the rights and privileges guaranteed by the State and Federal constitution are always limited by such regulations as come within the proper police power of the state or municipality.

Laws have been passed under the police power in some instances actually forfeiting property, apparently in direct violation of the constitutional provisions providing that no property shall be taken without due process of law. (*Fisher v. McGirr*, Gray Mass. p. 1.)

The following are a few instances of legislation just referred to;—legislation forfeiting gaming instruments. (*Com. v. Gaming Implements*, 119 Mass. 332), legislation forfeiting articles used in connection with the illegal sale of liquors, and liquors themselves. (*Mugler v. Kans.*, 123 U. S. 623), property seized for the violation of the revenue laws (24 Am. and Eng. Encyc. of Law 930).

Freund in his excellent work on police power, paragraph 542, says, "Legitimate police regulation may involve the improvement and alteration of property and this may result in rendering parts of the property to be improved or altered useless and perhaps in destroying their value as property. This should not be regarded as the taking of property, but as a necessary incident to regulation. * * * Thus where the law requires a house to be supplied with running water and sewerage connections, cisterns or privy vaults may be rendered useless or even be required to be abated though not imminently dangerous to health. Such a requirement is not open to objection as taking property without due process of law (citing the following cases; *Harrington v. Prov.*, 20 R. I. 233; 38 L. R. A. 305; *Com. v. Roberts*, 155 Mass. 281; 16 L. R. A. 400; *State v. Barge*, 82 Minn. 255; 53 L. R. A. 428).

In the case of *Yick Wo*, 68 Calif. 294, an ordinance was passed making it unlawful for any person "to establish, maintain, or carry on a laundry within the corporate limits of the city and county of San Francisco without having first obtained the consent of the Board of Supervisors; except the same be located in a building constructed either of brick or

stone." It appears that the petitioner was the owner of a laundry in existence at the time of the passage of this ordinance and applied for consent to maintain and carry on his laundry and this consent was refused for the reason that the laundry was not located in a building constructed of brick or stone. In this case the court said:

"To prevent the construction of wooden buildings within the densely inhabited portions of a city may become an imperative duty on the part of the authorities. They may not destroy those already erected. But the use of wooden structures within given limits, for specific and highly dangerous purposes, may become quite as detrimental as the erection of new structures of the same character; and as the power of regulation extends to the use as well as to the erection of wooden buildings, we can discern no assumption of unwarranted authority in the order No. 1569 which interdicts the establishing, maintaining, or carrying on laundries, except by consent of the board of supervisors, save in brick or stone buildings. The business of conducting a laundry involves a constant use of fires, under circumstances, and perhaps by persons, liable to result in conflagrations."

Subject to the limitation that building regulations must be reasonable and enacted in good faith, I am of the opinion that the municipality has the right to pass laws regulating buildings "in existence" as well as buildings "hereafter erected" under its police power and the fact that such regulation is retroactive or places such building out of business as claimed in your communication is immaterial.

Respectfully submitted,

MAX M. KORSHAK,

Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,

Corporation Counsel.

AUGUST 4, 1911.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

Pursuant to an order of the City Council of June 19, 1911 (Council Proceedings, page 500), this department has

made a careful investigation of the issuance by the Commissioner of Public Works, June 1, 1910, of a permit to the Iroquois Iron Company, for the construction of a pier and dock upon and along the south bank of the Calumet River and over and across the mouth of Calumet slip, and we hereby beg leave to report as follows:

The history of the Calumet River necessary to a proper understanding of the matter in issue, may best be told in the words of the official reports of the United States Engineer's office:

"Before improvement by the United States the Calumet River made a sharp bend southward just before reaching Lake Michigan and entered the lake about 3,200 feet south of its present mouth, leaving between the river and the lake a sand bar about 400 feet wide." (Bulletin 19, Appendix K. K. 1910.)

This was the condition in 1869 and until the government had completed the present river mouth and the two piers on either side of the new channel, which happened about the year 1872. The old river channel was subsequently known as Douglas Dock and as such seems to have continued to serve the purposes of navigation, as shown on the map hereto attached. However, the opening of the new river channel resulted in the gradual washing away of the sand bar between the old river bed and the lake.

In 1883 the whole strip had been washed away, and even the old river bed was covered by the waters of the lake. At this time the Calumet and Chicago Canal and Dock Company, which had acquired title to this land on both sides of the old river bed, was granted permission by the government to construct a breakwater on the original shore line of the lake to protect its own land and the south pier erected by the government in 1870. This done, the water receded sufficiently to uncover again a large portion of the old river bed at its junction with the present river channel.

In 1884 the government granted permission to the same company to construct the slip here in question. Its situs is just north of the old river bed and at its junction with the present channel it takes in part of the north end of the old

river bed and a portion of the south end of the old government pier. (U. S. Engineer's Reports, 1879, 1881, 1882, 1883, 1884.)

The records of the Village Board of Hyde Park fail to show any application by the Dock Company to the municipality for permission to construct Calumet Slip. (Official Proceedings, 1883, 1884.) The slip as built is shown upon the map herewith transmitted, which was copyrighted by the Dock Company in 1884.

March 21, 1888 the Calumet & Chicago Canal and Dock Company recorded in the Recorder's Office of Cook County, its plat of the northwest fractional quarter of fractional Section 5, Township 37, North, Range 15, east, south of the Indian Boundary line and east of Ewing avenue.

The surveyor certifies that he has subdivided said land into lots, docks, *slip*, streets and alleys.

The President and Secretary of the Company certify in its behalf that "we have caused the lands herein described to be subdivided and platted into lots, docks, *slip*, streets and alleys." (Book of Plats 29, page 11.)

The tax books of Hyde Park for the same year show the land to have been assessed as follows:

"Large Lot Dock I."

"Large Lot Dock II."

"Large Lot Dock III."

No taxes were assessed against the land covered by the waters of the slip. (Vol. 15, Collector's Warrant, Hyde Park, page 6.)

The books and maps on file in the Assessor's office of Cook County show the same facts for all the years following the year 1888.

The records of the Village Board of Hyde Park fail to show any acceptance by the municipality of the slip. (Official Proceedings, 1887, 1888 and 1889 to date of annexation.)

Subsequent to annexation the City of Chicago, while exercising jurisdiction over the Calumet River, did not at any time up to the passage of the Harbor ordinance, July 7, 1902, do anything that might be called an acceptance of Calumet slip.

The pertinent sections of the Harbor ordinance are in part as follows:

ARTICLE I.

“Sec. 1. (DEFINITIONS.) The harbor shall consist of the Chicago River and its branches to their respective sources, including that portion known as Ogden Canal, and all slips adjacent to and connecting with the Chicago River, the Calumet River, and Drainage Canal, the piers and basins, including the waters of the government breakwater which lie adjoining to, and extending three miles into the lake between the north and south lines of the city, and all the territory embraced between the limits of said survey as aforesaid shall be a portion of the harbor of the City of Chicago, and shall be subject to the control of the harbor master and to all the rules and regulations which are now or may hereafter be provided by the city council * * *.”

ARTICLE IV.

“Sec. 1. (WHARVES AND DOCKS.) Every owner or owners, occupant or occupants of premises abutting on said harbor shall at all times keep the wharves and docks on said premises in good repair and safe condition. * * *

Sec. 2. (DOCK CONSTRUCTION — REPAIRING.) It shall be the duty of the Harbor Master to require all parties who may be engaged in repairing, renewing, altering or constructing any dock within the City of Chicago to produce a permit from the Department of Public Works of the City of Chicago, which permit shall specify the character and location of such repairing, renewal, alteration or construction * * *

Sec. 3. (PILE DRIVING—ENCROACHMENT ON HARBOR LINES.) No person or persons shall drive or place, or cause to be driven or placed any pile or piles, stone, timbers, earth or other obstruction in the harbor of the city without permission of the Commissioner of Public Works, * * *.” (Mun. Code 1905, Secs. 969, 997, 998, 999.)

December 11, 1905 the Calumet & Chicago Canal and Dock Company conveyed the land lying under and being the bed of Calumet slip and the Dock lots on its banks to the Iroquois Iron Company.

December 18, 1905, the latter company made application to the government for leave to fill in the slip.

December 30, 1905 the government engineers requested the Commissioner of Public Works of the City of Chicago "to state whether there is any objection to the granting of this request."

January 5, 1906, the Harbor engineer requested the reference of the application to the law department, which, on the 20th day of February, 1906, rendered an opinion holding that Calumet slip was dedicated to the public and that it would require the passage of an ordinance vacating the slip before a permit to fill in could issue.

Nothing further was done in the matter after this date until February 28, 1910, when a letter from the Mayor of Chicago, to which was attached the copy of a letter to the Mayor from Hon. J. M. Dickinson, Secretary of War, in relation to another application of the Iroquois Iron Company for leave to construct a dock across the mouth of Calumet slip, was transmitted to the City Council and by it referred to the Committee on Harbors, Wharves and Bridges, for action. (Council Proceedings, page 3198.)

March 8, 1910 the Chairman of said committee advised the Mayor by letter that a sub-committee appointed by him to investigate, had made a verbal report

"that the specifications according to which the work is to be done under the permit applied for, would result in the widening of the Calumet River and would be a substantial improvement over present conditions. In view of the foregoing facts, it would seem that the City can urge no valid objection to the Government granting the permit.

The Sub-Committee's report has not yet been submitted to the full Committee, but I have no doubt that the full Committee will approve it, and I, therefore, respectfully recommend that the War Department be informed that the City has no objection to the issuance of the permit."

(See letter attached to papers.)

The Committee on Harbors, Wharves and Bridges has made no report with reference to the matter in issue and still has the application before it, but on the 25th day of May, 1910, the law department, to which the question was referred by the Commissioner of Public Works, rendered an opinion

holding that the slip was private property, and that, therefore, "there are no legal objections to the permit issuing in accordance with the application."

Thereupon the permit was issued by the Commissioner of Public Works June 1, 1910.

Since then the Iroquois Iron Company has constructed the new concrete pier and dock fifty feet south of the old government pier and has filled in all but a small portion of Calumet slip.

The physical appearance of the remnant of the slip denotes utter neglect for many years past and entire decay of the piers on its banks, and in the water along the north pier lies an old dismantled schooner, which sank where it now lies many years ago.

A number of old residents of South Chicago, who have been spoken to with reference to Calumet slip and its public character, maintain that the slip has been used by the public, and that for a time the City Fire Boat was anchored in its waters. The company's officers, however, claim that the slip has always been maintained as a private slip.

Although organized under the Cities and Villages Act in August, 1872, the Village of Hyde Park never passed a Harbor ordinance, but its jurisdiction over the Calumet river was, nevertheless, recognized in many matters, such as the building, regulation and repair of ferries and bridges, as well as the removal of purprestures and nuisances from the stream. (Official Proceedings, October 4 and 20, 1883; April 5, 12 and 19, 1884; July 14 and 19, 1884; November 7, 1884; Rev. Mun. Code of Hyde Park, 1887.)

The foregoing statement furnishes in the most condensed form all the facts with reference to the matter in issue and the only question that now remains to be solved is: Was Calumet slip a private or a public water? If private, the permit issued by the Commissioner of Public Works settles the whole matter. However, if dedicated to the public and by it accepted, the permit was absolutely void and no rights of the city have been lost by its issuance.

It is the settled law of Illinois, established by a long line of decisions, which have been recognized and confirmed by the Supreme Court of the United States, that

“grants of land bounded on rivers or upon their margin, above tide water, carry the exclusive right and title of the grantee to the centre of the stream, subject to the public easement of navigation, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river. If the same person be the owner on both sides of the river, he owns the whole river to the extent of his lands upon it, and this title to the middle of the stream includes the water, the bed and all islands.”

Washington Ice Company v. Shortall, 101 Ill. 52, and cases cited;

Hardin v. Jordan, 140 U. S. 387, and cases cited;

Peoria v. Cent. Nat. Bank, 224 Ill. 43.

The Calumet and Chicago Canal and Dock Company was the owner of the land on both sides of the old river channel, with another frontage on the new channel, and as such owner, comes within the above definition. It clearly had the right to erect docks, wharves and slips conformable to the public regulations and to so place them as to have the benefit of the navigable part of the stream without interfering with the public right of navigation.

Chicago v. Laflin et al., 49 Ill. 172;

Chicago v. Van Ingen, 152 Ill. 624;

Dutton v. Strong et al., 67 U. S. 23.

Although the harbor area of the City of Chicago up to the passage of the Harbor Ordinance, July 7, 1902, did not include the Calumet River and the slips connecting therewith, the concurrent jurisdiction of the city was, nevertheless, recognized by the United States Supreme Court in *Cummings v. Chicago*, 188 U. S. 410, in which case it was held to be the duty of a riparian owner on Calumet River to first obtain the permit of the Commissioner of Public Works under the former Harbor ordinances of the city, before beginning the construction of a dock on his land fronting the river. In this case the owner had proceeded upon permission of the war department alone.

Farnham on Waters and Water Rights, page 521, gives the following definition of such structures:

“A dock, slip or basin is an opening into, or a place surrounded by wharves and piers for the accommodation

of vessels, which desire to utilize the accommodations afforded by such structures.”

Such slips, or basins, or canals are built as instrumentalities in aid of commerce by water, and thus we find that the Company, following the completion of the *slip*, published and copyrighted its “Map of Subdivisions of the Calumet and Chicago Canal and Dock Co., at South Chicago, Cook County, Illinois, 1884.” This map evidences the intention of the Company to dedicate Calumet Slip to the Public use in the following notations:

On the Eastern boundary it says: *Calumet and Chicago Canal and Dock Co's. Breakwater.*

To the South it shows: *Calumet & Chicago Canal & Dock Company's Yard.*

In the extreme Southwest corner of the map is marked: “25. *Reserved from dedication for Railroad uses and purposes.*”

I fail to find any such reservation from dedication to itself of *Calumet Slip*.

In this manner Calumet Slip was dedicated to public use as at common law.

As a matter of fact the company merely followed its charter, granted by the legislature in 1869, whereby it was empowered

“to enter upon and make surveys of any lands and premises between the south branch of the Chicago River or the Illinois and Michigan Canal and the Calumet River, which empties into Lake Michigan at or near section five (5), township thirty-seven (37) north, range fifteen east of the third (3rd) principal meridian, in Cook County, Illinois, for the purpose of ascertaining and locating the most advantageous route for constructing a canal, and are hereby authorized and empowered to construct and make a canal of such width as they shall determine, from such point on the said Calumet River as said company shall determine, to such point on the south branch of the Chicago River, or the Illinois and Michigan Canal, as the said company shall determine. The said company shall have the right to construct and make any part or portion thereof from time to time until the whole is completed, and may construct, use, operate and employ, and

maintain such docks, slips, basins, shipyards, dockyards, dry docks, warehouses and piers as said company may deem necessary and proper, and may make such rules and regulations as the company may prescribe for the passage in said canal of all boats, vessels or other watercrafts: Provided, no tolls or dues shall ever be charged or collected for the passage of any vessel, boat or watercraft in said canal."

To accomplish the object of its incorporation the Company was given power to acquire by condemnation the lands required for canal purposes.

"In conferring the power of eminent domain upon it, the legislature gave the strongest possible confirmation of the view that it is created for public purposes only."

Chicago Dock Co. v. Garrity et al., 115 Ill. 169.

Apparently as if to emphasize its common law dedication in 1884, we find the Company in 1888 subdividing and platting the property into lots, docks, *slip*, streets and alleys by a plat intended to conform to the statute. However, its generosity was thwarted by the negligence of the notary public who made the certificate of acknowledgment. He failed to state that the persons making the acknowledgment were personally known to him, and this omission defeated the Company's intention of adding to the perpetual easement of navigation already vested in the public by the map of 1884, the fee title to the land underlying the waters of the slip.

However, if the plat falls short of the statute, it is at all events a confirmation of the dedication at common law.

In this case the company's own history rises as a witness against it and in favor of its intent to dedicate to the public.

1. The first map published by the Company, although undated, was without doubt published before 1884. In this the Company says:

"This property in lots or blocks is now placed in market by the Calumet and Chicago Canal & Dock Co., with a capacious and ample Harbor, Railroad facilities to all points and other advantages."

This map shows a portion of the present slip.

2. The map of 1884 shows the completed slip and clearly points to a common law dedication of the same.

3. In the plat of 1888 the certificates of the surveyor and the officers of the Company follow the statute and confirm the intent to dedicate.

4. The Company's long continued failure to list the land underlying the slip for taxation and the failure of the public authorities to levy taxes against this land, are evidence of the fact that the slip was considered to be and was a public water-course and therefore, no more taxable than is the bed of a stream.

5. User by the public for more than twenty years confirms the original plan to dedicate.

6. If it was the intention of the Company as now claimed by its officers, not to dedicate Calumet slip to the public, great pains were taken by them originally to conceal that intention. The simple word "Private" after the word "slip" on the plats was all that would have been necessary to make this intention.

At this time, after having enjoyed freedom from taxation for more than twenty years, in addition to non-assumption of the burden of keeping in repair, the Company is estopped to claim title to the land under the slip free from the public easement of navigation.

Where one who claims ownership to a wharf and pier had continued to pay taxes thereon, which the public have accepted, and has made repairs when needed, an intention to dedicate can not be presumed, although the owner has permitted the public to use the same.

Irwin v. Dixon et al., 9 How. (U. S.) 32, 33.

Piers or landing places may be either public or private and the question whether they belong to one or the other class depends upon the purpose for which they were built, the uses to which they have been applied, the place where located, and the character of the structure. Where such a structure is not located in a harbor and has not been used by others, or held out as intended for such use, no implication will arise in favor of the public.

Dutton v. Strong et al., *supra*.

By the passage of the Harbor ordinance in 1902, Calumet slip became a public highway by water. And while the title to the land underlying the slip remained in the original owners, the same as the title to the bed of a navigable river in this state remains in the owner of the land on both banks, yet, by virtue of the dedication it became impressed and burdened with the public easement of navigation. The passage of the Harbor ordinance was a sufficient acceptance of the dedication.

“When the dedication is beneficial or greatly convenient or necessary to the public, an acceptance will be implied from slight circumstances.”

Owen v. Village of Brookport, 208 Ill. 44.

In *Yates v. Judd*, 18 Wis. 127, it was held that where proprietors of land in the City of Milwaukee had executed a plat on which they designated certain portions of it as a part of the Milwaukee River and, after such dedication the Common Council of Milwaukee had established a “dock line” farther within the stream than the line of original dedication, this was an acceptance by the public of the dedication.

An owner of land may dedicate to the public use highways by water as well as by land, and if, when dedicated, they are not passable, the public may make them so.

Gould on Waters, Sec. 111, p. 214.

Yates v. Judd, *supra*.

Arnold v. Elmore, 16 Wis. p. 509.

People v. Williams, 64 Cal. p. 498.

So a canal cut for the purpose of improving the navigation of a stream, may be dedicated to the public.

Weatherby v. Meiklejohn, 56 Wis. p. 73.

“An issue as to the existence of a perpetual easement in public grounds and streets claimed by a municipality by virtue of an alleged dedication, involves a freehold.”

Stevenson v. Lewis et al., 244 Ill. 147, p. 153.

In this case we find a navigable canal, 140 feet wide and 1532 feet long, situated most advantageously near the mouth of the harbor, clearly dedicated, held out as intended for public use and used by the public. The place where constructed

and the very character of the canal itself plainly indicate an intention on the part of the Company to attract vessels to anchor in it and to load and unload their cargoes on the Company's valuable dock lots, for which it continued to pay taxes.

Considering all the circumstances surrounding the present case, I am of the opinion that Calumet slip was dedicated to the public and was properly accepted and that, therefore, the Commissioner of Public Works was without authority under the ordinances of the City to issue the permit in question.

I am further of the opinion that, irrespective of the question of dedication and acceptance, the Commissioner of Public Works acted without authority in the premises, for the following reason:

It appears from the application to the war department as well as from the plans furnished to the City of Chicago, that the work contemplated involved the widening of the river channel.

Paragraph 30 of Section 1 of Article V of the Cities and Villages Act, confers upon the City Council the power, "to deepen, widen, dock, cover, wall, alter or change the channel of water courses."

Chapter 145, Rev. Stat. entitled "Vacation of Streets, Alleys and Highways," provides that a public highway may be vacated by a vote of three-fourths of all the aldermen elected, and that the vote must be taken by yeas and nays and entered on the record of the Council.

"Acts of legislation by a municipal corporation which establish a permanent rule of conduct of government and which are to have a continuing force and effect must be established by ordinance."

Village of Altamont v. B. & O. S. W. Ry. Co., 184 Ill. p. 51.

In the exercise of the powers granted to it by the charter, a municipal corporation acts in its legislative capacity, and such action can only be by ordinance.

Chicago & Northern Pacific R. R. Co. v. City of Chicago, 174 Ill. 439, p. 446.

The matter still being in the hands of the Committee on

Harbors, Wharves and Bridges, it should be left to this committee to deal with the question as it may deem best and to report its conclusions to the City Council.

Respectfully submitted,
(Signed.) NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,
Corporation Counsel.

AUGUST 5, 1911.

PHILIP S. POST, Esq., International Harvester Co., Harvester Building, Chicago.

Dear Sir:

Your communication of August 3rd asking for an interpretation of the towel ordinance passed July 17, 1911, has been referred to me for reply.

The following is the interpretation placed upon this ordinance by this office:

“ ‘Public lavatory or washroom’ as used in said ordinance means any lavatory or washroom in any building or place which is open to the use of, or access is given to, any other person or persons than the owner or person or persons in charge or control of said lavatory or washroom.

Where any lavatory or washroom is open to the use of the public generally, or the employes of the owner or person or persons in charge or control of said lavatory or washroom generally such lavatory or washroom is subject to the provisions of the ordinance referred to herein.

This ordinance, therefore, includes lavatories or washroom maintained for the use of employes generally.”

Yours truly,
LORING R. HOOVER, (Signed.)
Assistant Corporation Counsel.

Approved:

MACLAY HOYNE,
Acting Corporation Counsel.

AUGUST 5, 1911.

MR. HENRY ERICSSON, Commissioner of Buildings.

Dear Sir:

The Corporation Counsel has referred to me for attention

your communication dated July 14th, 1911, hereto attached, addressed to him, wherein you ask this department to advise you regarding the placarding of buildings in compliance with Section 251 of the Municipal Code.

You state in this communication that in buildings of Class 1, the minimum capacity of floors in new buildings is one hundred (100) pounds per square foot and that in existing buildings of Class 1 you find a large number of cases where the capacity of the floors is less than one hundred (100) pounds per square foot and in some cases as low as from fifteen (15) to twenty (20) pounds per square foot and that in treating existing buildings you have been issuing placards put on buildings showing the minimum capacity of their floors down to forty (40) pounds per square foot allowing them to be placarded in the regular manner with their showing the safe load they will sustain. You further state, that below capacity of twenty (20) pounds to the square foot you have refused to issue floor load placards and that you would like to be advised as to whether you can require the owners of existing buildings to strengthen up to the minimum ordinance requirement of one hundred (100) pounds.

Section 251 of the Municipal Code provides that it shall be the duty of the owner of every building of Class 1 now in existence or hereafter erected to affix a placard stating the uniformly distributed load per square foot of floor space which may with safety be applied to any particular floor and that it shall be unlawful to load any floor to a greater extent than the loads indicated upon such placard. This same section also provides that it is the duty of the architect of all buildings to calculate the figures for such placards which shall be verified by the Commissioner of Buildings before they are affixed.

Section 252 however, provides as follows:

"The floors of all buildings of Class 1 shall be designed and constructed in such a manner as to be capable of bearing in addition to the weight of floor construction, partitions, permanent fixtures and mechanisms that may be set upon the same, a live load of one hundred (100) pounds per square foot of floor surface and the strength of such building shall be increased above the capacity

to carry such a live load of one hundred (100) pounds per square foot of floor surface, when the uses to which such building or part thereof, is to be applied, involve greater stress. The calculations and loads shall be in accordance with the provisions of this chapter."

In accordance with the above section the owners of existing buildings contend, and I believe that they are right in their contention, that this section, providing for floors of buildings of Class 1 to be constructed so as to be capable of bearing one hundred (100) pounds per square foot does not apply to buildings in existence at the time of the passage of the ordinance.

I do not believe that this section can be construed as affecting existing buildings, but only applies to buildings hereafter erected for the reason that in construing ordinances a retroactive effect will not be given unless it clearly appears that such shall be intended.

Russell & Allen, Drainage District, v. A. J. Benson et al., 125 Ill. 490.

Marsh v. Chestnut, 14 Ill. 223.

(*Hyman v. Bayne*, 83 Ill. 256.)

The above cases refer to the construction of Statutes, but the rule for the construction of ordinances is the same.

I. C. R. R. Co. v. City of Chicago, 169 Ill. 329.

Stanton v. City of Chicago, 154 Ill. 23.

In addition to the foregoing, Section 514 under Article XII General Provisions provides as follows: .

"In construing the several sections of this chapter said sections shall not be construed as requiring alterations in the construction or equipment of buildings or structures in existence at the time of the passage of this chapter, except where specifically provided, unless such buildings shall not have sufficient or adequate means of egress therefrom or ingress thereto, by reason of insufficient or inadequate stairways or stairways improperly located or insufficient or inadequate elevators or elevator equipment, doors, fire escapes, windows or other means of egress or ingress, and except also in sections which are herein made retroactive."

It is thus clear that the provisions of Section 252 apply only to buildings hereafter erected.

Section 516, Clause "C" provides as follows:

- "The 'live loads' per square foot of floor areas * *
 * shall not be less than the following:
 Class 1100 Pounds.

"

This section also will not be operative upon existing buildings for the same reasons above enumerated.

I cannot find anything in the code which prevents owners of present buildings of Class 1 from using their floors up to its safe capacity no matter how small. The Building Department cannot prevent an owner of an existing building from placarding buildings of Class 1 even as low as from 10 to 20 or lower if necessary, bearing in mind however, Section 201 B which is as follows:

"It shall be the duty of the Commissioner of Buildings when any citizens represent
 that any part of any building in the city is in an unsafe or dangerous condition or in any wise in contravention of this chapter, to make an examination of such place or building and if such representation is found to be true, said commissioner shall give notice
 to the owner to make such changes, alterations, or repairs as safety or the ordinance of the city may require. Upon failure of parties so notified to comply with said notice the matter shall be placed in the department of law for prosecution."

Under this section I take it that buildings "now existing" must be considered according to the circumstances of each particular case. When your department examines a building and finds that the floors are unsafe by reason of the purposes for which the floor is being used, then you have a right to insist that such floor be strengthened up to such a point where such floor is safe. You cannot enforce an arbitrary rule that each building shall have a carrying capacity of one hundred (100) pounds to the square foot. In some buildings twenty (20) pounds to the square foot would be too much while in others (80) pounds to the square foot would be too much.

Your suggestion that the ordinance be amended is a proper one and the amendment may be drawn in the form that you suggest in your communication, filling in the blank with

such a number as your department would find proper, the question as to what number shall be filled in the blank being an engineering proposition rather than a legal one.

You state in the conclusion of this letter that your department is at present in a perplexing position as to what to do with buildings of less capacity than forty (40) and twenty (20) pounds per square foot and especially with those whose capacity is less than twenty (20) pounds.

I do not see why this question should cause you any difficulty whatever.

If you find a building having a capacity of even ten (10) pounds to the square foot it is either safe or unsafe according to the loads which these floors are subjected to, or may be subjected to.

If the floor is safe then your department should feel no particular concern. If it is not, then under Section 201 B, herein referred to, you have the right to compel the owner to strengthen the floors up to such a point that it will be safe according to the purposes and uses to which the floor is put.

Respectfully submitted,

MAX KORSHAK,

Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,

Corporation Counsel.

AUGUST 4, 1911.

MR. F. W. SOLON, Acting Superintendent of Streets, Chicago.

Dear Sir:

We have yours of July 6, 1911, *in re*, closing of Troy street intersection of Franklin boulevard by The West Chicago Park Commissioners, and requesting advice as to the City's rights in the matter of opening the intersection.

This intersection is right in the heart of J. W. Taylor's Subdivision of the West Half of the South West Quarter of North West Quarter of Section 12, Township 39 North, Range 13, one-half of the subdivision being north of and the other half being south of Franklin boulevard. The subdivision and plat of same was filed for record in the office of the

Recorder of Deeds of Cook County, on February 25th, 1874. The plat shows Troy street as extending north and south between the east and west half of the subdivision and over and across Central Park (now Franklin) boulevard, and the intersection has been in continuous use by the public since 1874. Ordinary traffic thereon has extended across the boulevard with the knowledge of and without objection by the park commissioners. The West Park Commissioners recognized this intersection, many years ago, by building curbs on the east and west lines of Troy street, between the center and side driveways of Franklin boulevard, thus keeping Troy street intersection open for public travel over and across the boulevard.

If the park commissioners ever had exclusive jurisdiction or control over this intersection they have lost it by virtue of the recognition above mentioned and by the continuous and uninterrupted use of the intersection by the public for thirty years or more. The rule of law, however, is that the jurisdiction of the City over intersections of streets with boulevards is concurrent with the jurisdiction of the park commissioners. Neither the City nor the park commissioners, without the consent and concurrence of the other, has the right to close up street and boulevard intersections or to authorize the placing thereon of any kind of obstruction to public travel.

The jurisdiction of the City and park boards over street and boulevard intersections was very thoroughly discussed by our Supreme Court in a case exactly in point with the one now under consideration, wherein the West Park Commissioners sought to enjoin the City from interfering, *through its police force*, with the construction of a viaduct on the line of South West boulevard at its intersection with Nineteenth and Twenty-first streets, which viaduct was being constructed by the C. B. & Q. R. R. Co., under an agreement between that company and the park board, and being constructed in such a manner as to practically close up several streets. Judge Tuley in the Circuit Court, upon hearing dismissed the complainant's bill holding that the jurisdiction of the City and park board must necessarily be concurrent, that neither had a right to close up street and boulevard intersections without the consent of the other. The park commissioners appealed

to the Supreme Court and that court in sustaining the decision of the lower court said :

“The streets and boulevard must be regarded as intersecting streets, the former under the control of the City and the latter under the jurisdiction of the park commissioners. By the statute the most comprehensive powers are given to the City over the streets within its domain, and by the Park Act the same power and authority over the boulevard are vested in the park commissioners. Each corporation is of equal power and dignity within the limits assigned to it by the law, and each has an equal right within the areas covered by these intersections, which belong to both in common. *It would be the height of absurdity to say that at each intersection of a street with a boulevard the powers of either cease at the line of intersection and begin again when the intersection is passed.* It was unquestionably the design of the legislature that a boulevard, when laid out, should be a continuous driveway for pleasure and that the *streets crossing it should be continuous highways.* It could not be contemplated that either authority could cut off or close up the intersecting way without leave of the other. If the commissioners have the power to shut up these streets and compel the public to go around two hundred and fifty feet north or four hundred feet south over a new crossing, they have a right to shut them up absolutely. The principle is the same in either case, *and the existence of such a power cannot be conceded.* The jurisdiction, as we think, is concurrent, the commissioners having jurisdiction over the boulevard for all its uses and purposes, and the city having jurisdiction over the intersecting streets, subject to any limitations of use that may arise out of the park acts.”

Park Commissioners v. City of Chicago, 170 Ill. 620-21.

You are therefore advised that the City may interfere to prevent the closing up of Troy street at its intersection with Franklin boulevard and may, if necessary, use the power of its police department for that purpose; and if the street is now closed the same power may be used to open it.

Respectfully submitted,

GEO. P. FOSTER,

Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,
Corporation Counsel.

AUGUST 8, 1911.

HON. F. W. SOLON, Acting Superintendent of Streets.

Dear Sir:

I have your letter of July 19, 1911 in which you state that complaint has been made of shutting off Thirty-eighth street with an iron fence by the Illinois Central Railroad Company; that a bathing beach has been established at the foot of the street; that the neighbors are anxious for some means of ingress and egress, and that a watchman be stationed at that point. You ask; "What are the city's rights in this matter?" Your inquiry involves:

First: Is there a public street at Thirty-eighth street extending east across the Illinois Central tracks to Lake Michigan?

Second: What other rights has the city in the premises?

As to the facts involved, I have spent some time in examining plats, maps and records in the Recorder's office, at the Chicago Title & Trust Company and at the Library of the Chicago Historical Society. I have also looked the ground over in person and have had personal interviews with Mr. Charles S. Cleaver, son of Charles Cleaver, who originally owned the land at this point and Mr. J. G. Drennan, District Attorney for the Illinois Central Railroad Company. Further an Investigator from this office has made several trips to the premises and has interviewed and taken statements of several persons, who are old time residents in that immediate vicinity. From the foregoing investigation and interviews, I find the facts as follows:

1. The Illinois Central Railroad Company purchased its right of way at this point, one hundred feet in width, from Charles Cleaver on April 13, 1852, before this tract was subdivided; and the deed from Charles Cleaver and wife to the Illinois Central Railroad Company contains the following reservation:

"And it is understood that said Company shall erect and maintain crossings every four or five hundred feet *for the accommodation of said Cleaver, his heirs and assigns, whose lands are divided by said track*, and shall also erect and maintain such cattle guards and lawful fences as will divide the lands occupied by said company from the ad-

joining lands on each side; and as far as practicable prevent intrusion upon, or passage across, the lands and railroad occupied by said company."

A re-record of this deed may be found in the Recorder's Office in Book 653 of Records, at page 587.

2. The land in question was platted as a part of Cleaver-ville, October 4, 1858 by Horatio G. Loomis and David Hess, assignees of Charles Cleaver; and the map of same was recorded on the same day in Book 143 of Maps, page 99.

3. An abstract map made from an original letter press copy of an abstract made from said Plat by Shortall & Hoard and now belonging to the Chicago Title & Trust Co. shows the street to have been platted as Pier street and extending east from Lake avenue across the Illinois Central tracks to Lake Michigan. On the portion of Pier street lying east of the right of way of the Illinois Central Railroad Company as shown on said map, the following description and reservation appears:

"Pier street reserved for the use of owners of adjoining lots and blocks."

I attach herewith a blue print made from a tracing which shows the street as platted and indicated upon the map above referred to.

4. I have also examined in the Library of the Chicago Historical Society a map of Cleaver-ville, said to have been made about the time this tract was subdivided and which shows substantially the same as the map of the Chicago Title & Trust Co., including the reservation above referred to. There is, however, this exception that the name "Pier Street" appears West of the Illinois Central right of way instead of east of the same, and on the western boundary of the right of way a heavy black line is shown as crossing said street, where a stone wall and iron gate now stand, instead of the broken or dotted line shown upon the abstract map. What meaning is intended by this heavy black line is not further indicated.

I have also examined in said Library numerous maps bearing dates ranging from 1869 down to 1911 and made by the following map-makers. Rufus Blanchard, J. Van Vechten, A. Askevold, A. N. Marquis & Co., L. M. Snyder & Co., and Rand, McNally & Co. All of these maps show Pier street or

38th street as extending east from Lake avenue across the Illinois Central tracks to Lake Michigan, but do not show said fence, gate, stone wall or the said reservation on Pier street east of the tracks. None of these maps, however, purport to have been made under official authority or to possess any official or legal significance.

5. On January 14, 1895 an ordinance was passed changing the name of this street from Pier street to Thirty-eighth street. In said ordinance the termini of said street are indicated as follows: "from Lake avenue to Lake Michigan."

6. East of the tracks Pier street is bounded on the north by Block One (1) of Cleaverville and on the south by Block Four (4). (See blue print attached.)

I called at the Assessor's Office and was informed that the taxes on Block One (1) for the year of 1909 were paid on May 6, 1910 by W. L. Torbet for the Illinois Central Railroad Company. As to Block Four it was marked as belonging to the Illinois Central Railroad Company, but no tax was extended. The strip east of the tracks formerly known as Pier street was not listed on the Assessor's books. I was further informed that Blocks One and Four had been carried on the Assessor's books as above indicated for several years.

7. An inspection of the premises shows that Thirty-eighth street at the west line of the Illinois Central right of way is 29.9 ft. wide from curb to curb; that an iron gate occupies an opening in the stone wall which opening is 18.1 ft. in width, and the stone wall occupies the rest of the street width. There is a watchman stationed on the inside of the stone wall who tends the gate. On some days it is open from 7 o'clock a. m. to 6 o'clock p. m. and on other days from 8 o'clock a. m. to 4 o'clock p. m.; and it is known that it is sometimes closed as early as 3 o'clock p. m. East of the tracks and on the north line of the street is yet to be seen a cement floor, which is said to have been a floor or part of the brick brewery, indicated on said blue print attached, as lying immediately north of Pier street and 119½ ft. east of the 100 ft. right of way.

Just a few feet south of the remains of this brick brewery is the bathing beach in question. On the south side of Pier

street and east of the tracks was a packing house, where now stands a coal yard and the buildings used in connection therewith. The north end of said packing house encroached somewhat on the street line.

8. Among the persons interviewed as to former conditions were Charles S. Cleaver, the son of the original owner, W. H. Cleaver a nephew, F. W. Brooks a brother-in-law, O. S. Fabor, Jeremiah O'Sullivan, Alex B. Cook, W. F. Cook and Thomas A. Carberry. Some of these persons have lived in Chicago and in this immediate vicinity all their lives and have been familiar with the premises for periods of from thirty to sixty years. Their various statements embody the following:

That Pier street was open and used as a public street and was the only way of reaching the lake across the Illinois Central railroad tracks in this immediate neighborhood. That the pier indicated on the blue print was built about 1853 or 1854 and extended about 125 ft. into the water, and was used as a public pier. About the same time a frame building used as a soap and candle factory was built by Charles Cleaver, and later upon the same site was built the brick brewery, which at a still later time was used by a Mr. Fleischmann as a yeast factory. That this street from Lake avenue east to Lake Michigan was open for the full width and used by the public until the gate was placed there, by some persons said to be as early as 1880, but not erected until 1887 as claimed by the representatives of the Illinois Central Railroad Company. Mr. Brooks states that Mr. Charles Cleaver had more or less difficulty with the Illinois Central Railroad Company in establishing the rights of this strip as a public street, but his recollection is, that Mr. Cleaver had an understanding with the railroad company that should this property ever become closed up it should revert back to his original estate. Everybody who had occasion to go to the pier had full use of the street up to the time the gate was erected; and the railroad company maintained a warning sign at that point.

9. J. G. Drennan, Esquire, District Attorney for the Illinois Central Railroad Company has submitted a statement in writing, which contains the following:

“The Illinois Central Railroad Company having ac-

quired all the rights of Cleaver, not only adjacent to the private street east of the track, but also having acquired all other rights of Cleaver in the fee to this street, as well as his reversionary right, if he ever had any in the right of way, it would seem therefore that no one had any rights in the premises but the Company."

Mr. Drennan also points out that in 1852 the limits of Chicago did not extend south of Twenty-second street and the premises purchased were not laid out in lots or blocks or any part of any city, town or village, and also calls attention to the reservation with reference to Pier street east of the tracks on said Plat and to the reservation contained in the deed from Cleaver and wife to the railroad company.

He further sets forth that "this private street was not intersected by city streets," and that the railroad company has acquired title to Blocks One and Four immediately adjoining Pier street on the north and on the south; and refers to deeds under which he claims that the railroad company acquired all title and right in and to the strip of ground east of the tracks and formerly known as Pier street.

He also points out, that at the present time over five hundred regular trains daily use these tracks, that this does not include extra passenger and freight trains nor picnic trains; and that the crossing at this point at the present time if kept open would be no more nor less than a slaughter house.

He presents the affidavit of Joseph G. Pratt 69 years old, who says that he has worked in the land department of the Illinois Central Railroad Company continuously since 1863 with the exception of about the years 1871 and 1872; and who further states that Thirty-eighth street was never open across the tracks of the railroad company, and that whatever use was made of it was in and about the business of the railroad company at that point; that Thirty-eighth street terminates at the westerly line of the waylands of the railroad company and that the waylands at that point have been fenced continuously since 1868; and that the present stone wall in the vicinity of Thirty-eighth street and the present gates or like ones were placed at Thirty-eighth street about the year of 1887; and that the company has at all times exercised the right to close said

street during any hours when the convenience of its business requires.

Affiant further states that he is informed that Mr. L. T. Moore and Mr. L. P. Morehouse, who are at present absent from the city, can corroborate his statements.

I will now take up the first question above proposed, viz.: "Whether there is or ever was a public street at the place indicated?"

A public highway may be established in three ways: 1st. By condemnation in the mode prescribed by the statute. 2nd. By dedication, either statutory or common law. 3rd. By grant, which may be established by the deed making the grant, or by long continued user for twenty years or more implying a previous grant, and which is commonly known as "prescription."

As to the first method it does not appear from anything that I have been able to ascertain that the strip of ground in controversy was ever condemned for street purposes in any mode pointed out by the statute.

As to the second method "To establish a public street by dedication, three things must intervene; (1) an intention on the part of the owner of the land to dedicate the same to the public for street purposes; (2) an acceptance of the offer to dedicate the land for street purposes by the public; and (3) the proof as to the offer of dedication by the owner and the acceptance of such offer by the public, must be clear, satisfactory and unequivocal.

City of Princeton v. Gustafson, 241 Ill. 566, 569.

In the *City of Chicago v. Borden*, 190 Ill. 430, one Hugh T. Dickey executed and delivered a deed to one Hibbard Porter, which contained the following declaration, to-wit:

"It is hereby declared by the said party of the second part for himself, his heirs, executors, administrators and assigns, that a strip ten feet wide by ninety feet deep, being the west one-half of the above described premises, are (is) to remain forever open and unobstructed as and for an alley, *for the free use and enjoyment of the owners and occupants of said lot seven in block thirty-seven in common with the owners and occupants of the other lots of land and premises lying upon said alley.*"

The opinion of the court in this case written by Judge MAGRUDER sets forth as follows:

"Where there is a right of way, the use of which is confined to particular persons and to the owners of property opening thereon, it is regarded as a private right of way.

A private right of way serves as a means of accommodation to a limited neighborhood, for local convenience. It has been defined to be 'that right which one man has of going over another's land, and is confined either to the inhabitants of a particular district, or to those occupying or owning certain estates, or it extends to one or more individuals in certain.' (*Garrison v. Rudd*, 19 Ill. 558; *Illinois Insurance Company v. Littlefield*, 67 Ill. 368; *Carpenter v. Capital Electric Co.*, 178 Ill. 29; 2 Am. & Eng. Ency. of Law, 2nd Ed., page 149.) Where the term 'alley' is used in a deed or in a plat, it will be taken to mean a private alley * * * or where the contract requires that a different meaning than that of a public alley is to be assigned to the term."

When Charles Cleaver on April 13, 1852 executed the above mentioned deed of the right of way to the Illinois Central Railroad Company and included therein the reservation; "That said company shall erect and maintain crossings every four or five hundred feet for the accommodation of said Cleaver, his heirs and assigns, whose lands are divided by said tracks. * * * and as far as practicable prevent intrusion upon or passage across the lands and railroad occupied by said company, and when again on October 4, 1858, his assignees platted the strip of ground east of the tracks as "Pier street reserved for the use of owners of adjoining lots and blocks," it was evidently the intention of both Mr. Cleaver in said deed and his assignees in said plat to appropriate the right to use the strip of ground in question, not to the public at large, but to particular persons, who were the owners and occupants of the adjoining blocks one and four in Cleaverville. This strip of ground thus having been appropriated to the use of particular persons and not to the public at large, was a private street.

City of Chicago v. Borden, 190 Ill. at page 440:

"And the reference to this strip of ground by grantors of the abutting blocks in subsequent conveyances,

negatives the idea that there was ever any dedication of the alley or offer to dedicate the same as a public highway.”

There was then no intention on the part of the proprietor of this land to donate the same to the public use and consequently there was no acceptance thereof by the public, since there can be no acceptance of an offer to dedicate where there is no offer.

City of Chicago v. Chicago, Rock Island & Pacific Railway Company, 102 Ill. 561.

Not only is it true that the intention here originally was to make the strip of ground east of the railroad tracks and designated as Pier street, a private street, but it is also true there is no clear, satisfactory and unequivocal proof of any subsequent intention on the part of the owners to donate the same to public use. The vital and controlling principle in a common law dedication is the *animus donandi*, and where there is no manifestation on the part of the owner of the soil, either by formal dedication or by such acts as should equitably estop him of denying such intention, to donate the land to the use of the public, it cannot be said that there is a valid dedication.

“A dedication is not an act of omission to assert a right, but it is the affirmative act of the donor resulting from an active and not a passive condition of the owner’s mind on the subject. A mere non-assertion of a right does not establish a dedication, unless circumstances establish the purpose or intention to donate the use to the public.”

Grube v. Nichols, *supra*;

City of Chicago v. Chicago, Rock Island & Pacific Railroad Co., *supra*.

City of Chicago v. Borden, 190 Ill. at page 443:

The facts here indicate that not only were there no affirmative acts evidencing intention on the part of the owner to dedicate, but the things done by said owner conclusively indicate an intention to establish a private right of way; and the further fact that said strip has been shut off from full, free access and travel for the last twenty-four years further indicates that there was not an intention to dedicate Pier street east of the right of way to the public use.

It may be insisted, however, that although Pier street east of the tracks was originally a private street, it was subsequently changed into and became a public way or that the city has acquired a public right of way across and over this strip by the third method above mentioned, namely; by "prescription." "*That is to say, that the City by an alleged public user and an alleged acquiescence of the owners in such public user, has acquired title thereto, or a right to use the same*" as a public street.

In order to establish a way by "prescription," the use and enjoyment of what is claimed must have been adverse under a claim of right, exclusive and continuous and uninterrupted, and with the knowledge and acquiescence of the owner of the land, in or to which the easement is claimed."

City of Chicago v. Chicago, Rock Island & Pacific Railroad Co., supra;

Washburn on Easements, 131;

Toof v. City of Decatur, 19 Ill. App. 204;

Daniels v. People, 21 Ill. 439.

The facts here show that this strip East of the iron gate and stone wall has been closed since 1887, and while it is claimed by several persons that the strip was used as a public street and by the public generally prior to this time, it may well be inferred that the use of this strip prior to 1887 was for purpose of passage and repassage by the owners of the adjoining lots and blocks and by persons having business with said owners. If there was any use of the strip prior to 1887 by persons other than the owners or by any portion of the public, it may well have been a mere permissive use and not under any claim of right on the part of the public. Where there is use by mere permission only, and not adverse, there is no basis upon which a right of way by "prescription" can rest.

O'Connell v. Chicago Terminal Railroad Co., 184 Ill. 308.

"Where there has been user of a highway for a prescribed statutory period, a presumption arises from such user, that there has been a grant of the highway. This presumption, however, may be rebutted by testimony."

Grube v. Nichols, supra;

Washburn on Easements and Servitudes, pages 104-108;

City of Chicago v. Borden, 190 Ill. 430.

A prescriptive right is based upon the fiction of law that there was originally a grant of the right, the evidences of which are lost, but presumption based upon this fiction is conclusively overcome when the facts and circumstances indicate that a different interest or license was given instead of the one claimed. And in this case the presumption of a prescriptive right is overcome by the erection of the fence, stonewall and gate thereby excluding the public from the strip; by the reservation in Charles Cleaver's deed to the railroad company; by the reservation imprinted upon the plat; and by subsequent conveyances of the strip.

"A mere permissive use of a way laid out as a private alley, will not of itself transform it into a public alley."

Elliott on Roads and Streets, 2nd Ed., Sec. 25.

"A private way cannot be converted into a public way by the use thereof by the public, no matter how long that use may be continued, but there must be a dedication and an acceptance."

19 Am. & Eng. Ency. of Law, 1st Ed. 107.

The use of this strip will be presumed to have been in accordance with the intention of the owners and the intention of the owners was to make it a private way for the use of adjoining owners.

In *Illinois Insurance Co. v. Littlefield*, *supra*; our Supreme Court said:

"The use will be presumed to have been in accordance with the intention of the owners, and when the way is open as a private passway, and the fact clearly appears, it cannot be converted into a public highway, by the mere uses thereof, no matter how long that use may be continued." (*Hall v. McLeod*, 2 Metc. Ky. 105; *Carpenter v. Gwynn*, 35 Barb. 395; *Dexter v. Tree*, 117 Ill. 532; *City of Chicago v. Chicago, Rock Island & Pacific Railway Co.*, *supra*; *Lamb v. Manning*, 121 Ill. 612; *White v. Bradley*, 66 Me. 258.)

In the latter case it was said:

"A use which is simply permissive, however long continued, or the opening of a way as a private way and sub-

sequent use of it as such, whatever length of such use by others, will not make it a public way, nor does it amount to the proof of a dedication."

Washburn in his work on Easements and Servitudes, 2nd Ed. 184 says:

"And where a way is open as a private way and intended as such, and this can be shown, no length of use by others, will make it a public way."

City of Chicago v. Borden, supra.

Another circumstance that may be urged to overcome this, is the fact that the ground in question has not been assessed and no taxes have been paid upon it. It might be claimed that these facts show it to have been the intention of the parties that it should be a public way.

The city or the public cannot become entitled to an individual's property because no taxes are assessed against it and because by reason of such non-assessment, no taxes are paid by the owner. If this strip was the subject of taxation, it was the duty of the public officers to assess the same and enforce the payment of the taxes.

In *Illinois Insurance Co. v. Littlefield, supra*, it was said at page 372:

"It matters not in what way the grantors from Lindsey down to appellants may have described the premises they conveyed and as bounded by an alley; that does not bring the alley into existence as a public alley, nor does their saying so make it so. It is true, it was for many years open to the public, but Arenz claimed it at the time, so his brother and executor testifies, as his property, and, though he may have never paid taxes upon it, his right is not lost thereby."

City v. Borden, supra.

I am therefore of the opinion that the facts and circumstances relating to the strip of land, formerly known as Pier street in so far as I have been able to ascertain them and as set forth, wholly fail to establish that the said strip ever became a street either by condemnation, dedication or prescription; and that such use of said strip as may have been made by the public or any portion of the public is entirely consistent with the view that this use was merely permissive.

I may now take up the second question proposed at the outset, namely: "What other rights has the city in the premises?"

The Illinois Central Railroad Company was incorporated by special act of the legislature of this state in force February 10, 1851. See Private Laws of Illinois 1851 on page 61. The latter portion of Section 8 of said Act, which is the Charter of said Company at page 64, provides:

"Nothing in this Act contained shall authorize said corporation to make a location of their track within any city, without the consent of the Common Council of said City."

In pursuance of the above provision of said Section 8, the Common Council of the City of Chicago on June 14, 1852 passed an ordinance granting permission to said corporation to make a location of its track within the City of Chicago. Special ordinances of Chicago 1898, page 642.

The first section of which provides in part, as follows:

"That permission is hereby granted to the Illinois Central Railroad Company, to lay down, construct and maintain within the limits of the City of Chicago and along the margin of the lake within and adjacent to the same, a railroad with one or more tracks, and to operate the same with locomotive engines and cars, under such rules and regulations with reference to speed of trains. * * * not inconsistent with the public safety, * * * and upon the terms and conditions following, to wit: The said road shall enter said city at or near the intersection of its south boundary with Lake Michigan, following the shore on or near the margin of said lake northerly to southern bounds of the open space known as Lake Park," etc.

Section 6, page 644 of this ordinance, provides:

"The said company shall erect and maintain on the west or inner line of the ground pointed out for its main track on the lake shore, and as the same is hereinafter defined such suitable walls, fences or other sufficient works. as will prevent animals from straying upon or obstructing its tracks, and secure persons and property from danger. Said structures to be of suitable materials and slightly appearance and of such height as the Common Council may direct, and no change therein shall be made except by mutual consent.

Provided, however, that the company shall construct such suitable gates at proper places at the ends of streets, which are now, or may hereafter be laid out as may be required by the Common Council, to afford safe access to the lake; and provided also that in case of the construction of an outside harbor, streets may be laid out to approach the same, in the manner provided by law, and in which case the Common Council may regulate the speed of locomotives and trains across them."

The Illinois Central Railroad Company accepted the foregoing ordinance of June 14, 1852; and in that same year or shortly thereafter located its track as indicated and provided in Section 1 above; and said track today occupies the same or practically the same location as made in 1852. (Mr. Drennan has told me that the main track at 38th street is in the same position as when located in 1852.) At that time 1852, the City of Chicago extended only as far south as 22nd street and Mr. Drennan has called my attention to the fact that at this date the limits of Chicago did not extend south of Twenty-second street, and the premises in question were not laid out in lots or blocks, or any part of any city, town or village. This raises the question whether Section 6 of the Ordinance of June 14, 1852, *supra*, applies to this case.

By an act to reduce the charter of the City of Chicago and the several amendatory acts thereof into one Act, and to revise the same, in force February 13, 1863. (See Laws and Private Laws of Illinois 1863, Section 2 on page 41.) The corporate limits and jurisdiction of the City of Chicago were extended South to 39th street including the premises in question. Sections 2 and 5 of Chapter 17 of this same act, (page 153) provides, as follows:

"Section 2. All ordinances, regulations and resolutions now in force in the City of Chicago, and not inconsistent with this Act, shall remain in force, under this Act, until altered, modified or repealed by the Common Council, after this Act shall take effect."

"Section 5. This Act shall not invalidate any legal Act done by the Common Council of the City of Chicago, or by its officers, nor divest their successor's under this Act, of any rights of property or otherwise; or liability which may have accrued to or been created by said corporation prior to the passage of this Act."

About the year of 1897 the Illinois Central Railroad Company filed a Bill of Equity in the Superior Court of Cook County, against the City of Chicago, praying for an injunction restraining the city from interfering with or preventing the company from filling in certain land by the shallow waters of Lake Michigan, lying between Twenty-fifth and Twenty-seventh streets thereof, for the purpose of constructing an engine house thereon. This case was taken to the Supreme Court of the State and was decided there on June 18, 1898 and reported in the 173 Ill. page 471; and was taken by the railroad company to the Supreme Court of the United States and decided on March 12, 1900 and reported in the 176 U. S. Rep. at page 646. In said case the railroad company pointed out that at the time of the construction of its railroad in 1852 in the City of Chicago, the southern limits and boundaries of the city extended to Twenty-second street.

The city averred that under an act of the General Assembly of the State, approved April 10, 1872, it was empowered to "regulate and control the use of public landing places for docks and levees to make regulations in regard to the use of "harbors"; and that it was also empowered to regulate its police and pass and enforce all necessary police ordinances; and that in pursuance of this authority the City Council made and established an Ordinance (793) that "No person or persons shall drive, or place or cause to be driven or placed any pile or piles, stones, timbers, earth or other obstruction in the harbor of the city without the permission of the Commissioner of Public Works", etc.

The railroad company undertook to maintain the position that since the aforesaid Act of April 10, 1872, and the passage of the aforesaid ordinance (793) were both subsequent to the construction of its railroad; and since the said tract of ground between Twenty-fifth and Twenty-seventh streets, was not a part of the City of Chicago when said road was built and when the aforesaid ordinance of June 14, 1852, was passed by the Common Council and accepted by the railroad company; that said company was not bound by the said Act of April 10, 1872, nor by the ordinance of June 14, 1852, nor by

the said ordinance (793), nor further by that portion of Section 8 of the Act of February 10, 1853, incorporating said company, which portion of said section 8 as above set forth, and as set forth by the learned Judge in his opinion is as follows:

“Nothing in this Act contained shall authorize said corporation to make a location of their track within any city, without the consent of the Common Council of said City.”

In commenting upon the aforesaid Acts and ordinances, the court held, in an opinion written by Justice Brown, as follows:

“It is also insisted by the company that this restriction applies only to the City as bounded in 1851, at the date of the Charter, and that as the southern limit of the city at that time was Twenty-second street, no such consent is now necessary to be obtained, and though the boundaries of the city have long since been extended below the land proposed to be taken. Had the company signified a desire to take possession of these lands before the city had been extended, it is possible that it might claim a vested right to do so, though said boundaries were subsequently enlarged; but the object of the provision was evidently for the protection of cities in general, and not for the protection of cities as they existed at the date of the charter.

The road as originally constructed ran through an almost uninhabited country, and yet a country which gave great promise of a large population and of great cities being built up along the line of the road; and it is highly improbable that the growth of the state should not have been foreseen and contemplated in this legislation. Indeed it is impossible to suppose that the legislature intended that the road, so far as it passed through existing cities, all then insignificant, but so far as it passed through cities that might arise in the future, or existing cities, whose boundaries would be enlarged, it abdicated its power.”

The court cited the English case of *Regina v. Cottle*, 3 Am. L. & E. 474, said, Lord Campbell:

“We think that the Legislature contemplated the increase of Taunton within a period longer than that generally assigned for a generation of the human race, and intended that its inhabitants as it increased should be

exempt from annoyance of a turnpike gate cutting off free intercourse between neighbors in the same street."

Also the case of the *People v. Deham*, 153 N. Y. 528, in which the court said:

"When the right to use the streets has been once granted in general terms to a corporation engaged in supplying gas for public and private use, such grant necessarily contemplates that new streets are to be opened and old ones extended from time to time, and so the privilege may be exercised in the new streets as well as in the old. Such a grant is general in perpetuity, or generally dating its existence with such corporations or at least for a long period of time, and should be given effect according to its nature, purpose and duration."

The Illinois Central Railroad Company built and extended the said fence, gate and stone wall at 38th street in pursuance of Section 6 of the aforesaid ordinance of June 14, 1852, and has accepted the benefits under said ordinance, which has been and still is in full force and effect; and having accepted the benefits of the same, it cannot now refuse to bear the burdens and conditions imposed by said ordinance; or in the words of Mr. Justice Brown, in 176 U. S. 667:

"The railroad company cannot assert the power and in the same breath repudiate the condition."

In the case of the *People ex rel. City of Chicago v. the Chicago Telephone Company*, 220 Ill. 238, at page 249, the court said:

"The ordinances extend over the annexed territory immediately upon annexation, and the limitations of the ordinance apply to the annexed territory."

This exact language has been quoted and approved by the Supreme Court of the United States April 2, 1906, in the case of *Blair v. City of Chicago*, reported in the 201 U. S. 400, on page 489. See also *Chicago Union Traction Co. v. City of Chicago*, 199 Ill. 484, at pages 546 and 547.

I am therefore of the opinion that the proviso contained in Section 6 of the aforesaid ordinance of June 14, 1852, which is as follows:

"Provided, however, that the company shall construct such suitable gates at proper places at the ends

of streets, which are now, or may hereafter be laid out as may be required by the Common Council, to afford safe access to the lake,"

confers upon the City of Chicago ample authority to require and compel the Illinois Central Railroad Company to keep open the street gates at Thirty-eighth street, under proper management and supervision with regard to the public safety so as to afford safe access across its tracks to the lake.

In regard to placing a watchman at that point, I have consulted no authorities, but am of the opinion that the City has ample authority under its police powers to station a watchman at this crossing, if it should care to do so.

I return herewith the rough sketch, which accompanied your letter, and I also attach the blue print above referred to.

Respectfully submitted,

(Signed) JAS. G. SKINNER,

Assistant Corporation Counsel.

Approved:

(Signed) MACLAY HOYNE,

Acting Corporation Counsel.

AUGUST 16th, 1911.

HON. CHARLES E. READING, Chairman, Committee on Compensation.

Dear Sir:

We have your letter of June 14th, 1911, in which you ask us to advise your committee as to whether or not the portion of Indiana street between Peshtigo court and Lake Michigan is legally open and under the jurisdiction of the City of Chicago.

We have read carefully the previous opinion given by this office and referred to in your letter. This opinion was prepared by Assistant Cassels and approved by the then Corporation Counsel, Mr. Brundage. It is to be found on pages 86 to 101, inclusive, of the 3rd Vol. of opinions of the Corporation Counsel. It is quite lengthy and it deals with other questions as well as with this question as to the status of Illinois and Indiana streets east of Peshtigo court. You request us to single out this question from the others dealt with in this opinion, and to deal with this question specifically.

Messrs. Brundage and Cassels seem to assume in their opinion (although they do not expressly allege it) that the fee of Illinois and Indiana streets, where they abutted on Lake Michigan before the land east of Peshtigo court was made, was in the city. As you are no doubt aware, the streets of Chicago are held in two ways. Where there has been a valid statutory dedication, the fee is in the city. But in other cases the fee is in the abutting owner, subject to user by the public as a street. Having regard to the dedications by Kinzie in 1833 and by the Chicago Dock & Canal Company in 1885, referred to on page 98 of the opinion, we are of the opinion that Messrs. Brundage and Cassels were justified in assuming that the fee of these streets was in the city down to the line of the lake at the time that the land east of Peshtigo court was made.

This being so, we agree with Messrs. Brundage and Cassels in their conclusion that the title to these streets east of Peshtigo court and down to the present line of the lake is now vested in the City of Chicago in trust for the public and subject to the user by the public as streets.

This is subject however to the following two qualifications:

1. To the claims and rights of the State of Illinois in respect to such parts of said land as may have been made by artificially filling in or by a sudden and violent action of nature, such as a sudden retiring of the lake at that point during a storm, as distinguished from a gradual accretion.

2. To the rights (if any) of the Chicago Dock & Canal Company under Section 12 of its charter. (See this section set forth at foot of page 99 of opinion.)

What the effect of these two qualifications may be it is quite impossible to say definitely.

On the question of the title to gradual accretions, as distinguished from land made artificially, or land made by a sudden change, the opinion above referred to cites the cases of *Lovington v. St. Claire County*, 64 Ill. 56, and *Chicago Dock & Canal Company v. Kinzie*, 93 Ill. 415. This question has been several times before the Supreme Court since these cases were decided. See cases of *City of Chicago v. Ward*, 169 Ill.

392; *Cobb v. Commissioners of Lincoln Park*, 202 Ill. 427; and the very recent case of *Commissioners of Lincoln Park v. Fahrney*, 250 Ill. 256.

It appears from the opinion above referred to and the documents therein cited that, at the time of the construction of what is known as the Michigan Slip the shore line of the lake was west of the west line of what is now known as Peshtigo court. The Michigan Slip was completed in 1871. It, therefore, appears that all the land east of Peshtigo court must have been made within the last forty years. Further, from the statements contained on pages 98 and 99 of the opinion, it would seem that all of this land, as well as Peshtigo court itself and the land for some distance west of Peshtigo court, was made since the recording of the plat of March 16, 1885. The opinion (p. 84) states some strong reasons for believing that most of this land must have been formed by artificial filling.

However, as we have stated above, it is impossible to say definitely what the rights of the state to this land may be, until the matter shall have been determined in a judicial investigation. The best we can do is to say that it is highly improbable that the state will ever seek to deprive the city of its possession of these streets.

As to the rights of the Chicago Dock & Canal Company, we can only say that, after studying carefully the wording of Section 12 of the charter, above referred to, and after giving due weight to every fact adverted to in the opinion which bears upon this question, we are of the opinion that there is very little danger that the company will ever be able to disturb the city in its possession of these streets.

Regretting that we cannot make this opinion more definite as regards the practical effect of the two qualifications above stated, we are,

Yours respectfully,

WM. E. DILLON,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

AUGUST 18, 1911.

TO THE BOARD OF TRUSTEES, OF THE FIREMEN'S PENSION FUND.
Gentlemen:

Pursuant to the order of your board passed July 11, 1911, referring to this department for an opinion the application of Mathias J. Enright for a pension, I have examined said petition, together with a history sheet of the Cook County hospital, dated November 9, 1906, a copy of a certificate of John McDonough, ex-captain, engine company number 1, dated January 21, 1909, as well as a copy of a certificate of James T. Foley, ex-captain engine company number 13, dated January 21, 1909, a copy of a certificate of L. Blake Baldwin, dated March 17, 1909, and an order discharging Mathias J. Enright from the fire department for cause, signed by James Horan, fire marshal, dated October 30, 1908.

It appears from the papers referred to that the petitioner, Mathias J. Enright, while a member of the fire department of the City of Chicago, and in the performance of his duty on April 19, 1904, sustained an injury to his right hand and as a result of said injury, it became necessary to amputate the middle finger of his right hand. Subsequently the petitioner reported for duty, but was compelled to discontinue his duties as a fireman on several occasions by reason of the condition of his right hand. It appears, however, that from December 28, 1906, until October 30, 1908, he was on active duty in the fire department. On the last mentioned date he was discharged from the department for cause.

Under an Act entitled "An Act to create a board of trustees of the firemen's fund," etc., approved May 13, 1887, in force July 1, 1887, as amended by an Act approved June 1, 1907, and in force July 1, 1907, your board is created and its powers expressly prescribed. Your board has no greater powers than those contained in the Act.

Section 7 of said Act is as follows:

"RETIREMENT ON ACCOUNT OF PHYSICAL OR MENTAL DISABILITY.) If any member of the fire department of any such city, village or incorporated town shall, while in the performance of his duty, become and be found, upon an examination by a medical officer ordered by said board of trustees to be physically or mentally permanently

disabled, by reason of service in such department, so as to render necessary his retirement from service in said fire department, said board of trustees shall retire such disabled member from service in such fire department: Provided, no such retirement on account of disability shall occur unless said member has contracted said disability while in the service of such fire department. Upon such retirement the said board of trustees shall order the payment to such disabled member of such fire department monthly, from said pension fund, a sum equal to one-half the monthly compensation allowed to such member as salary at the date of his retirement."

Section 11 of said Act reads:

"TO WHOM ACT APPLIES.) This act shall apply to all persons who are now or shall hereafter become, members of such fire departments and to all persons who are now beneficiaries of the Firemen's Pension Fund and all such persons shall be eligible to the benefits secured by this act."

From the foregoing provisions it is clear and beyond question that the person applying for a pension under Section 7 of the act, as above quoted, must be a member of the fire department.

Your board has no more power to order payment to the petitioner from said pension fund than if he had never been a member of the department. This is a matter of discretion on the part of your body, because even if you should unanimously determine to place the petitioner upon the pension list, your order would be void and of no effect.

I return herewith all papers above mentioned.

Very respectfully yours,

JOSEPH F. GROSSMAN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

AUGUST 28, 1911.

H. B. WHITE, Esq., Secretary, Committee on Finance.

Dear Sir:

We are in receipt of your letter of July 8th, requesting that the Committee on Finance be furnished a general opinion

as to the liability of the city for any damages caused by dirty water or grease dripping from elevated railroad structures or from tracks over subways.

The legislature has conferred upon the City Council exclusive power over the streets and alleys of the city. See Section 62, Chapter 24, Hurd's R. S. 1909, page 343. Enumerated powers 7th, 9th and 90th.

Paragraph 193 aq. Chap. 24, Hurd's R. S. 1909, page 366, provides:

“The city council may also regulate the use of space over the streets, alleys and public places of the city, and upon payment of proper compensation, to be fixed by ordinance, may permit the use of the space more than twelve feet above the level thereof.”

The railroad companies (elevated and others) are using the streets and alleys of the city under various ordinances passed by the city council in pursuance of the legislative authority granted in above named sections of the Cities and Villages Act.

It is a well settled rule of law that when a municipality, acting under its charter powers, grants a license or franchise for the use of its streets to private persons or corporations it will not be held liable for the acts of such persons or corporations. Text writers agree on this rule and the courts generally, seem to sustain it. The granting of a franchise or license to railroad companies or other persons for the use of the streets is not an act of ownership but an act of municipal government. It is an exercise of police power expressly conferred upon the city by the legislature, and in making such a grant there is no breach of the city's statutory duty with regard to its streets and alleys.

Jones on Negligence of Municipal Corporations, sec. 86, referring to damages arising from the granting of licenses states that—

“Some interesting cases have arisen upon the question of municipal responsibility for the negligent acts of licensees in the public streets. In general, it may be stated that there is no responsibility for such acts, as licensees are not servants of the municipality, and as the granting of licenses under proper ordinances involves the governmental power of legislation.”

Abbott on Municipal Corporations, Section 974, states that:

“Where a public corporation grants, under authority of law, a license, privilege or franchise for the use of its public ways, to private persons, the usual rule obtains that it will not be liable for the acts of such grantee though they may be negligent and result in injury.”

In *Michigan City v. Boeckling*, 122 Ind., page 39, the court said:

“The common council had authority to license the street railway company to use the street. It is now well settled that a street may, under proper authority, be used by a company engaged in transporting passengers in cars * * * and in licensing such a use of its streets a municipal corporation does no wrong and violates no duty. The use which the city licensed the company to make of the street was not dangerous in itself, and the city, is therefore, *not liable for the negligence of its licensee.*”

In *Hubbell v. The City of Viroqua*, 67th Wisconsin, 343, the court held:

“That the fact that the city authorities licensed the carrying on of a business within the city limits generally does not render the city liable for an injury caused by such business being carried on in an improper manner.”

In *Burford v. City of Grand Rapids*, 53rd Mich. 98, the court held that a municipal ordinance permitting a particular street to be coasted on did not make the city liable for injuries resulting from the coasting to persons on the street; their right of action was against the person inflicting the injury.

The court said:

“The wrong attributed to the city is that, through its common council, it gave permission for the use of Fountain street for the amusement of coasting. This permission was given in assumed exercise of the legislative power conferred upon the city to control the use of the streets, and the action raises the question whether a municipal corporation can be liable, as for a tort, for injurious consequences resulting from an exercise of its legislative authority. Legislative power, whether held by the law making authority of the state, or by municipal bodies, is in its nature governmental and discretionary,

and as a general rule, a right of action as for a tort will not arise from any exercise of discretion in respect to it."

In *Murphy v. City of Chicago*, 29th Ill. 279, Murphy sued the city for damages occasioned by the city allowing a railroad company's tracks to be laid in Water street, and raising the grades of the street. The court said:

"It is a settled law of this court, as well as in most of the states of the Union, that it is the legitimate use of a street or highway to allow a railroad track to be laid down in it, and for so doing the city is not liable for any damages which may occur to individuals."

Other courts might be quoted but the above taken from a group of middle west states will suffice to show the general trend of authority on the subject. There are exceptions to the rule, but they are confined to cases where a license was granted to perform acts which were unquestionably dangerous in themselves, or which were authorized by the municipality in excess of its authority conferred by statute and on that account the municipal corporations were held to answer for their results.

I would, therefore, advise your committee that the city is not liable for any damage caused by dirty water or grease dripping from elevated railroad structures or from tracks over subways, and that persons who suffer such damage must seek their remedy in an action against the companies or individuals causing the injury.

Respectfully yours,

GEO. P. FOSTER,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

SEPTEMBER 15, 1911.

MR. VERNON L. BEAN, Sec'y. Boards of Examiners of Plumbers.

Dear Sir:

Under date of September 11, you requested of this department an opinion as to the authority of the Mayor to

revoke the certificate of a master plumber who employs unlicensed men to do the work of journeymen plumbers.

We gather from your communication that these master plumbers employ unlicensed men to do the work of journeymen plumbers either knowingly or unknowingly, and that upon an attempt by the Board to enforce the law, they are met with the defense that these men are helpers, which as you claim, is merely a subterfuge to escape the necessity of securing a license for such journeymen plumbers.

Nothing is contained in the article covering this subject that prevents or prohibits a certified master plumber from employing an unlicensed journeyman plumber, nor does the article provide for the revocation of the certificate of a master plumber except where such master plumber himself violates, neglects, or refuses to comply with any of the provisions of the article.

The mere employment of a journeyman plumber who is unlicensed or has not a certificate issued by the Boards of Examiners of Plumbers, is not made by the statute or by the ordinance a cause for the revocation of the certificate of a master plumber, who may employ such unlicensed journeyman plumber.

In the absence of such provisions, we are of the opinion, that the Mayor cannot legally revoke the certificate of a master plumber except where he violates some one or more provisions of the article. The employment of an unlicensed journeyman plumber by a master plumber is not a violation of any of the provisions of the article.

As a means of discipline for the enforcement of the article, in the case where an unlicensed person does the work of a journeyman plumber, the Board of Examiners of Plumbers has two remedies. 1st. A prosecution under Section 1781 of the Chicago Code. 2nd. Asking the refusal of the Board of Health to inspect or approve any work done by such unlicensed journeyman plumber.

Very truly yours,
(Signed) HENRY A. BERGER,
Assistant Corporation Counsel.

Approved:
(Signed) WM. H. SEXTON,
Corporation Counsel.

SEPTEMBER 20, 1911.

HON. LAWRENCE E. MCGANN, Commissioner of Public Works.

Dear Sir:

We have your letter of the 30th ult., in the above entitled matter. To this letter you attach a communication from the President of the Northwestern Elevated Railroad, and to these communications there is attached a large blue print map.

Three questions arise in regard to this matter, namely:

1. Has the city the power to compel the removal from the streets of these abandoned and unused curves?

2. Has the city the power to authorize the company to keep these structures in the streets for the purpose for which the company now says it proposes to use them?

3. If it has the power referred to in the second question, ought it to exercise such power and enter into an arrangement with the company under which these structures would be allowed to remain permanently in the streets to be used for the new purpose indicated?

The first two questions are lawyer's questions. The third question is not specially a lawyer's question, but we shall offer our opinion upon it for what it may be worth.

As to the first question, we have already answered that in the affirmative, when we advised you to serve a notice on the company calling upon them to remove these structures from the streets.

As bearing upon the second and third questions the following propositions may be laid down:

1. The city holds the streets in trust for the public, and the city has no authority to permit a permanent obstruction of the streets by a private individual or corporation.

2. As regards obstructions by a quasi-public corporation, and for a public use, the city has the power to authorize such an obstruction, provided there is a public purpose to be served which renders the obstruction practically necessary, or at least eminently expedient. By this we do not mean that it must be shown that it is practically necessary that the obstruction should be placed in the particular place or in the particular street where it is placed; but that it is at least eminently expedient that the streets somewhere in that neighborhood

should be obstructed to the extent allowed in order that the needed service may be rendered to the public. Furthermore, the privilege to obstruct the streets is, in such cases, given strictly in consideration of, and on condition of, the rendering of the services specified in the ordinance granting the privilege.

These principles are sufficiently settled not to need the citations of authorities but the following authorities may be referred to:

- People v. Suburban R. R. Co.*, 178 Ill. 594;
- Hibbard v. Chicago*, 173 Ill. 91;
- Snyder v. City of Mt. Pulaski*, 176 Ill. 397;
- Chicago General R. R. v. C. C. R. R. Co.*, 62 Ill. App. 502.

Answering the questions above stated in the light of these principles we note the following facts:

1. The curves in the streets specified in the title have ceased for a considerable time past to be needed for the purpose for which the leave to place them there was given. They have in fact been abandoned and have been out of use for a year or more.

2. It is now proposed to use them for a purpose different from, but ancillary to, the purpose for which they were allowed to be put there. This purpose is in no sense necessary, but might in certain contingencies be convenient.

3. This purpose only calls for the laying of a single track upon these old curves. They were built for a double track. They, therefore, obstruct the streets much more than is necessary for the rendering of the proposed new service.

4. The proposed new purpose would be better served by widening the structures upon which the new and improved curves are laid so as to lay a third track along the outside of these structures from the points where the old curves leave them to the points where the old curves meet them again. This plan would involve a much less serious obstruction of the streets than the leaving in the streets of the old curves.

These things being so, we are of the opinion that it is at least possible that an abutting property owner might enjoin the city from carrying out an arrangement with the company

under which the old curves should be allowed to permanently remain in the streets for the new purpose indicated. And, even assuming that the city has the power to make such an arrangement, it does not seem to us that it ought to do so.

Yours respectfully,

WILLIAM DILLON,
Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,
Corporation Counsel.

SEPTEMBER 21st, 1911.

HON. F. W. SOLON, Acting Supt. of Streets, Chicago, Illinois.

Dear Sir:

Your favor of the 12th inst. requesting an opinion as to whether the contractor or the city is entitled to "the salvage from old streets about to be improved" has been referred to me.

In reply I beg to say that I am of the opinion that the salvage belongs to the City and not the contractor. I take this view irrespective of the manner in which the streets may have been originally improved, whether by Special Assessment or by payment out of the general funds of the City. In either case the principle is the same which is that the materials that go into the streets should be considered as a contribution to the public and become the property of the City for the use of the public. This precise question so far as I can find has not been decided in Illinois, but the conclusions I have expressed are supported by decisions in other states.

In the case of *Schmitt et al. v. City of New Orleans*, 48 La. Ann. Rep. 1440, where a street was to be paved and the old material had to be removed, it was claimed by the abutting property owners that they were entitled to the value of the old cobblestones that were to be taken from the street. It was held by the Supreme Court of Louisiana that the City was the owner of the stones and not the property owners, the court saying on page 1443:

"It would be impractical for the city to dispose of

the stones and to return to each property holder his proportion of the value. When they were placed in the street at the cost of the property holders it was a contribution to the City, and they became the property of the City for the use of the public."

In *Snyder v. City of Lexington*, 49 S. W. 765, in which the City took up the sidewalk and curbing in front of a lot and appropriated it to its own use, it was claimed by the property owner that he had the right to recover for the value of the curbing and the brick in the sidewalk. But the Court of Appeals of Kentucky denied this right, holding that the property belonged to the City. In this regard the Court said:

"The sidewalk was as much a part of the street as is the driveway in it. When the sidewalk was built by the appellant, it was for public use and became subject to the control of the City authorities."

From these authorities it will be seen that the disputed question of ownership arose only between the abutting property owners and the City and there was no suggestion whatever as to any possible ownership on the part of the contractor. I cannot conceive any ground, independently of a contract between the contractor and the city, on which the contractor could claim ownership of the old material in a street which he was to improve.

Although, as I have stated, there are no authorities in Illinois directly in point, yet there are decisions which tend to sustain the rule announced in the case above cited. In the *Town of Palatine v. Kreuger*, 121 Ill. 72, it was held that a municipality had the power to prohibit by ordinance the abutting owner of the fee from removing any dirt or earth from any of the streets for any personal use without first obtaining the consent of the municipality.

In the case of *City of Mount Carmel v. Shaw*, 155 Ill. 37, 43, which followed the case of *Baker v. Town of Normal*, 81 Ill. 108, it was held that:

"Shade trees in a public street of a city are the property of the municipality and it has complete control over them."

Similarly in respect to the ownership of rock or earth

excavated from a street, the Supreme Court of Minneapolis in the case of *Viliski v. City of Minneapolis*, 40 Minn. 304, held that when it becomes reasonably necessary for purposes connected with the use or improvement of a street, to have earth or rock excavated and removed therefrom, the public authorities may do this, unembarrassed by claims of private owners, and may dispose of the material which they are required to remove without accounting to the owners of the soil.

From what has been said it follows of course that since the City is the owner of the salvage or old material referred to in your communication, it may dispose of the same in any manner that may be for the best interests of the public.

Respectfully submitted,

FRANK JOHNSTON, JR.,
Assistant Corporation Counsel.

Approved:

PHILIP J. McKENNA,
Atty. Board Local Improvements.

Approved:

WM. H. SEXTON,
Corporation Counsel.

SEPTEMBER 21, 1911.

HON. BERNARD W. SNOW, Alderman 7th Ward.

Dear Sir:

Your communication of the 13th inst. with reference to a permit issued to the Knickerbocker Ice Company, to construct an artificial ice manufacturing plant on the Company's property at 61st street and Lexington avenue, has received from this department the consideration which the importance of the subject seems to demand.

There can be no question that the location of such an establishment in a residence district is a serious detriment to the value of property, but I question whether it can be considered such a menace to the health and comfort of the neighborhood as would bring it within those provisions of the charter whereby the city is empowered to regulate, prohibit, prevent

and direct the location of certain factories and other establishments.

By subdivision 63 of Section 1, Article 5 of "An Act to provide for the incorporation of Cities and Villages," the city has the power "to regulate and prevent the carrying on of manufactories dangerous in causing and promoting fires."

Subdivision 83 of the same section and article empowers the city "to prevent any offensive or unwholesome business or establishment within or within one mile of the limits of the corporation."

Subdivision 65 empowers the city to "regulate and prevent the storage of gunpowder, etc., and other combustible or explosive material, etc."

Clearly an ice making plant does not come within subdivisions 77, 79, 81, 82, 84, 93 and 95 whereby power is conferred upon the city to regulate and direct the location of any of the establishments and enterprises which are specifically named in said paragraphs.

At the recent session the General Assembly in its wisdom saw fit to add Sanatoria, Undertaking Establishments, Machine Shops, Garages, Laundries, Bathing Beaches, Second Hand Stores and Junk Stores and Yards to the list of places the location of which may be regulated by Cities and Villages. Evidently the business of manufacturing ice has not as yet been deemed to warrant any legislative regulation.

By appropriate ordinances the city provides for the proper construction and inspection of "Ice Making Houses and Cooling Plants." (Sections 2408 to 2415 incl., Mun. Code 1911.)

In a similar manner the quality of the supply of ice for domestic use and its storage is regulated and the sale thereof licensed by the city. (Sections 1293 to 1300, Mun. Code, 1911.)

The manufacture of ice can hardly be claimed to be offensive or unwholesome and unless the safeguards provided are disregarded or violated, I fail to find any authority vesting the city with power to prevent the construction of the proposed plant. I am therefore constrained to hold that the

Company may use its property for the purpose indicated in your letter.

Very truly yours,
NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:
WILLIAM H. SEXTON,
Corporation Counsel.

N. B.—By request of Alderman Snow submitted to Alderman Nance.

SEPT. 21, 1911.

TO THE HONORABLE THE CITY COUNCIL OF THE CITY OF CHICAGO.

Gentlemen:

On the 10th day of July last, your Honorable Body passed the following:

“Ordered, That the Corporation Counsel be and he is hereby directed to advise this Council at its next regular meeting whether or not 103rd street between the Pullman R. R. right of way and Lake Calumet and Stony Island avenue, between 95th street and Lake Calumet is public or private property.”

On the 17th day of July last, the following order was passed:

“Ordered, The Corporation Counsel is hereby requested and directed to advise this Honorable Body whether or not 95th street from Lake Michigan to City limits is a public street and of what width.”

Pursuant to said orders this department has made investigation of the several matters so submitted and begs leave to report as follows:

103rd Street.

This was opened as a public highway according to statute by the Highway Commissioners of the town of Worth in 1860, as appears from a copy of their proceedings herewith transmitted. Since that part of the highway about which this question has arisen was low land, nothing seems to have been done in those early days to make it passable, until the City of Chicago through its street department in recent years, began to dump ashes and other refuse along the line of said street

near Lake Calumet in order to raise the ground to a level with that part which had been worked by the old town authorities of Worth before its annexation to the town and later village of Hyde Park in 1867.

The claim of the Calumet and Chicago Canal and Dock Company to this street and its recent action in stopping the city from dumping upon it ashes and other refuse, are both without warrant of law and should not be permitted to stand in the way of making 103rd street passable to Lake Calumet. The street as opened by the Highway Commissioners under the law of 1860 is four rods or sixty-six feet in width from Lake Calumet to the old Chicago & Michigan City road.

Stony Island Avenue.

As in the case of 103rd street I find the Calumet & Chicago Canal & Dock Company laying claim to Stony Island avenue between 95th street and Lake Calumet. While admitting that a dedication may have been attempted the company insists that it acquired title to the land over which this public highway is supposed to run, without notice of such fact and that certain owners having title thereto did not join in the deed of dedication to the town of Hyde Park. The assertion of the company that it has paid taxes upon the land in question, is borne out by the records.

Opposed to the Company's claim, I find the following facts:

1—The deed of dedication to the Town of Hyde Park, dated October 18, 1869, and recorded January 22, 1878, although not acknowledged, is executed by George W. Waite and Elam G. Clark, two of the incorporators of the Calumet & Chicago Canal & Dock Company, and by James H. Bowen, the president of its first board of directors, as well as by Chancey T. Bowen, Sheridan Wait and Elliot Anthony, members of that body.

2—Dobson's Atlas of Hyde Park of 1874 shows it as a street 200 feet wide from 67th street to Lake Calumet. And it should be remembered that Dobson was the surveyor who platted most if not all of the Company's early subdivisions.

3—In 1878 the Village of Hyde Park, the successor of the former town, passed an ordinance for the construction by

special assessment, of a ditch on the west side of Stony Island avenue from 87th street to Lake Calumet. The Calumet & Chicago Canal & Dock Co., which was one of the defendants in this case in the County Court, not only failed to file objections to the assessment but paid the same without murmur. The fact that James H. Bowen, one of the leading lights of the company, was one of the three commissioners appointed to appraise the cost of the improvement, may partly account for its readiness to pay its assessment, but without question the main factor that moved its generosity was the draining of its practically useless swamp lands in the Calumet region, which upon the completion of the ditch became quite valuable for subdivision into lots and blocks and acres for manufacturing purposes.

4—In 1882 the President and Board of Trustees of Hyde Park passed an ordinance to widen and deepen the Stony Island avenue ditch by special assessment to be borne by the owners of land specially benefited by such improvement. In this case the Calumet & Chicago Canal & Dock Company did not remain a passive defendant, but filed objections which deserve to be called to its attention at this time when its officers seem to have forgotten that portion of its self-made history. In my opinion these declarations at that early day, are absolutely conclusive of the City's rights over Stony Island avenue.

The pertinent objections to this proposed improvement filed in the County Court, are as follows:

"That Stony Island avenue was conveyed, on or about the 18th day of October, 1869, to the Town of Hyde Park by the owners of the lands through which said avenue passed '*for the use and purpose of a boulevard and common highway for the public,*' and afterwards *Stony Island avenue*, Woodlawn avenue and Eighty-seventh street in said Village of Hyde Park were *platted and specifically dedicated to a particular use, to-wit, as streets, avenues or public highways*; and having been thus dedicated, neither the state nor municipality has a right to divert it from that purpose except under the right of Eminent Domain."

"The money proposed to be raised by the proposed special assessment of the property of said Canal & Dock

Company is to be used *to destroy the streets and avenues specially dedicated by said company to the public for public highways.*"

5—In 1891 the Calumet and Chicago Canal & Dock Co., made a subdivision of all that part of the North East quarter of Section 2, Township 37 North, Range 14, lying *west of the west line of Stony Island avenue.*

6—In 1902 the Company issued a prospectus and report in which its achievements in the Calumet region are duly and no doubt truthfully chronicled. *The maps which are shown in this document bear out my contention that Stony Island avenue is a public highway, 200 feet wide, to Lake Calumet.*

7—For many years and until a recent date, a street car line has been in operation on Stony Island avenue between 63rd and 99th streets.

95th Street.

The same corporation asserts its claim of ownership with reference to portions of 95th street. These claims melt away when tested by the records, and I hold that 95th street is 100 feet wide between Lake Michigan and State street, and west of State street the City may justly claim a uniform width of 66 feet. I base my opinion upon the following facts:

1—In 1874 the Calumet & Chicago Canal & Dock Co. made and recorded its subdivision of "South Chicago". As in the case of Stony Island avenue the surveyor who did the work was R. W. Dobson. This plat shows 95th street of a uniform width of 100 feet.

2—In the same year R. W. Dobson published "Dobson's Atlas of Hyde Park", which shows the street as 100 feet wide from Douglas Slip to State street.

3—The records of the Town of Worth show the street to have been opened as a public highway from Western avenue to Vincennes Road. Under the laws then in force a public highway had to be of a uniform width of four rods or sixty-six feet.

4—Generally, 95th street is open and has been in use as a public highway for over forty years from Willow Springs to South Chicago. It is a macadamized road from Cottage Grove avenue to South Chicago.

5—In deeds executed by the Calumet & Chicago Canal & Dock Company, reference is made to “the west line of Stony Island avenue and the north line of 95th street,” and other lands were conveyed “excepting therefrom one hundred feet in width upon the west line and fifty feet in width upon the north line of said described piece or parcel of land which has been devoted to public highway or streets.”

6—In 1881 the Village Board of Hyde Park passed an ordinance for the improvement of 95th street from Commercial avenue to Michigan avenue. In the County Court to which the matter was taken for confirmation, the Calumet & Chicago Canal & Dock Co., and Elam G. Clark, one of the property owners whose name appears upon its articles of incorporation, filed objections to the proposed improvement. If 95th street between the streets named was not a public highway this was the time and place for said corporation to assert its superior title, and yet I find that none of the objections filed by the company goes beyond the usual ones filed by owners of property adjoining a public highway which is to be improved.

The foregoing is the history of the threet streets in question upon which the Calumet & Chicago Canal & Dock Company is forced to base its claims of title and in the face of which it proposes to give to the city a strip of land 100 feet wide west of Stony Island avenue, between 95th street and 103rd street in place of the clearly dedicated 200 feet now extending in a straight line to the head of Lake Calumet and in addition will permit the opening of 103rd street to said Lake and the widening of 95th street to 100 feet immediately east of Stony Island avenue, provided the city will forego its just claim to Stony Island avenue between 95th street and Lake Calumet.

The law on the subject may be summed up as follows:

“A highway may be established and proved by prescription, by dedication and by laying out the same as directed by statute.”

Alvord v. Ashley, 17 Ill. 363.

“Dedication may be proved by grant, by user, or by acts and declarations of owner.”

Marcy v. Taylor, 19 Ill. 634.

“An intention to dedicate may be manifested by
* * * writing, declarations or acts.”

Gentleman v. Soule, 32 Ill. 272.

Smith v. Town of Flora, 64 Ill. 93.

“The sale of land according to plat constitutes dedication by estoppel.”

Gridley v. Hopkins, 84 Ill. 528.

“Acts and circumstances, as contribution by owner to cost of improving alleged street estop him from denying dedication.”

Rees v. Chicago, 38 Ill. 322.

“The public is an ever existing grantee capable of taking dedications for public uses, and its interests are a sufficient consideration to support them.”

Warren v. Town of Jacksonville, 15 Ill. 240.

In the present case both the facts and the law lead me to the conclusion that 103rd street is a public highway to Lake Calumet, duly established according to statute and that the public rights to said highway have never been abandoned; that Stony Island avenue was dedicated as herein set forth and is a public highway 200 feet wide to the waters of Lake Calumet; and that 95th street was dedicated as a public highway and has a uniform width of 100 feet between Lake Michigan and State street and that the city may justly claim a minimum width of 66 feet between State street and Western avenue. The acts of the public authorities charged with jurisdiction in the premises, are sufficient for the assumption that all three streets have been accepted by them as public highways.

All of which is respectfully submitted to the consideration of your Honorable Body.

Yours very truly,

NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,
Corporation Counsel.

SEPTEMBER 22, 1911.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

In the above matter, now pending before your committee upon the petition of the Town of Cicero, which states that the town is willing to accept Judge Windes' decree and pay the premium on a policy guaranteeing the title to the town hall block, and which also prays that the litigation may be terminated, the record discloses the following facts:

In 1866 Austin & Merrick recorded in the Recorder's office of Cook County, their plat of a subdivision within territory of the township Cicero. The plat which conforms in all respects to Chapter 109, Revised Statutes, among other blocks, shows Block 1, marked "Holden Park". All the lots abutting said block were at once sold with reference to the plat so recorded.

In 1867 the legislature, by special act, incorporated the township Cicero, aforesaid, as the town of Cicero. In 1869 this act was revised and additional privileges were granted the town, among which is the power "to purchase, receive and hold property * * * for public grounds or town purposes, for the use of the inhabitants of said town, and * * * sell, lease or dispose of town property, real or personal, for the benefit of said town, and improve and protect such property * * *."

In 1870, Henry W. Austin, the dedicator, his wife joining, by quit-claim deed conveyed said block 1 to the town of Cicero. There is nothing in the record whereby this instrument can be construed as a revocation of the dedication made by Austin and Merrick in 1866. No deed of revocation appears of record. The only light thrown upon this matter is contained in the petition to perpetuate testimony, in *Town of Cicero v. Charles C. Merrick, et al.*, case number 43,404, Circuit Court, in which Henry W. Austin, with reference to the manner in which he came to give the deed, testified in substance as follows:

"They (the trustees of the town) came to me and told me they wanted a quit-claim deed to this property, because they intended to make some improvements. I told them it was not necessary; that I had already donated it

to the public, but they insisted and I finally gave them a quit-claim deed. * * *"

Following the delivery of this quit-claim deed the town authorities evidenced their acceptance of the property conveyed by erecting upon a part of said block a town hall, and by beautifying and ornamenting with grass, flower beds, shrubbery, trees, walks and benches the remainder of said plot of ground as a public park and place of amusement and recreation. A part of the town hall was permitted to be used for the holding of public meetings and a bandstand was erected in the park for the holding of concerts. Meetings and concerts were held there and the people generally used the park for purposes of recreation and amusement, the town paying the expense thereof out of its treasury. The square was kept open, just as parks and public squares are usually kept.

This continued uninterruptedly until 1899 when that part of the town known as "Austin", which embraced "Holden Park", was annexed to the City of Chicago.

The record fails to show that the owners of property fronting on said block 1 have ever objected, as they might have done, to the dual use to which said block was put by the town authorities.

These are the facts upon which Judge Windes has predicated a decree, by the terms of which the value of "Holden Park" is fixed at \$83,000.00 and interest from the time possession was taken by the city.

The decision of the court is based upon the assumption that the town authorities had failed to accept the block marked "Holden Park" upon the plat recorded in 1866, and that by his quit-claim deed in 1870, the dedicator had revoked the dedication and that his deed vested in the town of Cicero the fee of said land free and clear of the easement created by the dedication, and that, therefore, it is to be considered as corporate or public property of the town and comes within the provisions of the "Annexation Act."

We are here confronted with two instruments which apparently conflict with one another. On the one hand we have a statutory dedication, which, upon acceptance, vested the fee

title of the block dedicated in the town of Cicero. On the other hand there is a quit-claim deed from the dedicator given four years after the dedication, whereby he conveys to the donee whatever interest he may have in the said property.

It is true that before acceptance by the municipality the dedicator could have revoked his donation by a deed of vacation executed in the manner prescribed by statute, and the mode there prescribed excludes any other. This, Austin did not do, and, therefore, the original plat still stands. As to abutting lot owners, the dedication became irrevocable upon the delivery of title deeds made with reference to the plat.

We are thus called upon to construe here the relative effect of the dedicator's quit-claim deed, subsequently given, upon the statutory dedication made in his plat theretofore recorded. Had the dedicator intended to revoke his gift, he would have done so by a deed of vacation, as provided by statute. The fact that he did not do so raises and warrants the presumption that it was not his intention to vacate that part of the plat marked "Holden Park". This presumption is further strengthened by the fact that the deed runs to the town and not to a stranger to the dedication. On the other hand had the town sought to obtain title to the block free and clear of the easement enjoyed by the public as well as the abutting property owners, it would have insisted upon a deed of vacation.

This presumption becomes an absolute certainty when considered in the light of Austin's testimony in the case heretofore mentioned. By accepting the dedication as made, the town of Cicero would have assumed the burden of creating and maintaining a park for the use of the people of the town. The town needed land upon which to build a town hall for the transaction of its business and why not get the consent of the dedicator to the proposition to build upon part of the dedicated land? By giving his quit-claim deed the dedicator precluded himself from ever objecting, as he might have done without it, to this use by the town of part of the land. Abutting property owners acquiesced in this user for the very reason, perhaps, that it would and did enhance the value of their property. By its acceptance of the deed and its subsequent

conduct, the town should be held to have accepted the dedication with the one exception of the building of a town hall upon part of the land.

This, it seems to me, is the only logical deduction to be made from the two instruments in question. The quit-claim deed should not be construed as tantamount to a vacation, but as confirmatory of the dedication made by the plat. As a conveyance of the fee title, the deed was superfluous, because upon its acceptance of the dedication, the town automatically became the owner of the fee, in trust, for the use of the public. The deed, therefore, could serve only one purpose, and that was to remove all legal obstacles which the dedicator might have interposed to the plan of the town to assume the burden which an acceptance of the dedication entailed only with the added privilege to erect and maintain its town hall upon part of the ground dedicated.

I am, therefore, of the opinion that "Holden Park" is impressed with the easement created by the plat of Austin & Merrick; that the block in question is not corporate property of the town of Cicero, and is, therefore, not such property of the corporation as is contemplated by the "Annexation Act".

Holding the park merely as a trustee for the public, the town could, as a municipality, acquire no interest adverse to its beneficiary, the public, and annexation did not change the situation, the City of Chicago being only the successor in trust of the town.

Abutting property owners who have bought with reference to the plat, have not lost their rights by acquiescence in the use of part of the block for a town hall, and may enjoin the city whenever it threatens to devote the remainder of the block to other than park purposes.

The papers bearing upon the matter, which are hereto attached, do not seem to warrant the City in accepting the proposition of the town of Cicero, that it will furnish a policy guaranteeing the title, provided the city waives its right of appeal and writ of error.

The policy is to be issued by the Real Estate Title & Trust Company only upon condition that it shall be subject to,
 "Limitations, reservations or restrictions, if any, con-

tained in the quit-claim deed from Henry W. Austin and wife to the town of Cicero, dated September 10, 1870."

This deed was not introduced in evidence and is claimed to have been lost.

It is my opinion that the Supreme Court of this state should be the final arbiter in this controversy in order that the city's rights with reference to Holden Park may be definitely and securely established.

Respectfully submitted,
(Signed) NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

(Signed) WM. H. SEXTON,
Corporation Counsel.

SEPTEMBER 22, 1911.

HON. JOHN MCWEENY, General Superintendent of Police.

Dear Sir:

We have your letter of the 7th inst. asking us, if we deem it advisable to prepare an ordinance giving members of the police force authority to shoot dogs found running at large unmuzzled.

You indicate in this letter that the use of such a power would be in your opinion very unpopular, and would lead to considerable danger from promiscuous shooting. But you think it possible, that if it were publicly announced that such an ordinance had been passed by the Council, the mere announcement might have the effect of compelling dog owners to be more careful.

The Cities and Villages Act, in Article V, Section 1, subsections 78 and 80, provides as follows:

"78. That the City Council shall have power to do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease.

"80. To regulate, restrain and prohibit running at large of horses, cattle, swine, sheep, goats, geese and dogs."

In exercise of the powers conferred by these subsections the City Council has passed an ordinance entitled

"Dogs", which is Chapter 20 of the Code of 1911. This ordinance provides among other things:

"That if any dangerous, fierce or vicious dogs cannot be safely taken up and impounded, such dogs may be slain by any policeman."

We are not aware that the Supreme Court of Illinois has ever passed upon the question as to whether a city incorporated under the Cities and Villages Act, has the power to pass an ordinance authorizing policemen to kill on sight by shooting or otherwise dogs found at large without muzzles, there being an ordinance requiring such dogs to be muzzled.

In the case of *Haller v. Sheridan*, 27 Indiana 494, the Supreme Court of Indiana had this question before it. The statute provided: The Board of Trustees shall have power "To declare what shall constitute a nuisance, and to prevent, abate and remove the same, and to take such other measures for the preservation of the public health as they may deem necessary." The court upheld an ordinance passed under this power requiring all owners of dogs within the town to muzzle them securely or keep them upon their own premises, and directing the town marshal to kill all dogs found running at large in violation of the ordinance.

To a similar effect is the decision of the Supreme Court of Maryland in the case of *Hagerstown v. Maryland*, 86 Md. 293. On the other hand the Court of Criminal Appeals of Texas in the case of *Lynn v. The State*, 33 Tex. Crim. Rep. 153, has held that a statute which gave cities and towns authority "to regulate and restrain the running at large of dogs, and to authorize their destruction when at large contrary to ordinance", did not empower the city council to pass an ordinance making it the duty of the city marshal and policemen to shoot all dogs found without muzzles in any street, alley, sidewalk or other public highway within the city limits. It was held that dogs were property and that the ordinance was in violation of the sections of the Bill of Rights, which forbid destruction of property without adequate compensation and which forbid the depriving of citizens of property without due process of law.

Upon the whole, we are of the opinion that it would prob-

ably be held by the Supreme Court of Illinois, if the question were to come before it, that the City Council of Chicago has the power to pass the ordinance which you ask for as a sanitary measure and as a means of protecting the residents of the city against the danger of hydrophobia. But for the reasons which you yourself suggest, as well as for other reasons, it does not seem to us likely that it would be easy to get such an ordinance passed by the council. It might be done on the understanding that you would see that it was not acted upon. But, if the council were asked to pass the ordinance on such an understanding, the objection would be raised that it would not be proper for the council to pass an ordinance upon the understanding that it was not to be enforced. Moreover, if it were once known to the members of the City Council that the ordinance was not intended to be acted upon, that fact would be sure to become public, and thus the object you have in view would be defeated. Dog owners would not be scared by the passage of an ordinance which they knew was not to be acted upon.

If, after reading this opinion, you still think that it would be desirable to ask the council to pass such an ordinance, advise us to that effect and we will proceed to prepare the ordinance.

Your respectfully,

WILLIAM DILLON,
Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,
Corporation Counsel.

SEPTEMBER 23, 1911.

GEORGE B. YOUNG, M. D., Commissioner of Health.

Dear Sir:

We have your letter of the 11th inst. in regard to the above entitled matter. To this letter you attached a communication from Dr. Clara P. Seippel, in which four questions are asked. These questions all have reference to the necessity of obtaining, under various states of circumstances, the frontage consents required by the ordinances of Chicago as a condition

precedent to the building or maintaining of a hospital within the city limits.

Before taking up these questions one by one and answering them, it will be well to quote the sections of the Municipal Code which directly bear upon them.

Section 265 of the Code of 1911, page 84, provides:

"It shall be unlawful for any person, firm or corporation to build, construct, maintain, conduct or manage in any block in which two-thirds of the buildings fronting on both sides of the street or streets on which the proposed hospital may front are devoted to exclusive residence purposes, any hospital, unless the owners of a majority of the frontage in such block, and the owners of a majority of the frontage on the opposite side or sides of the street or streets on which said building faces consent in writing to the building, constructing or maintaining, managing or conducting of any such hospital in said block. Such written consents of the majority of said property owners shall be filed with the commissioner of health before a permit shall be granted for the building or constructing, or a license be issued for the maintaining, conducting or managing of any such hospital."

Section 1219, page 455, repeats the requirements of the section just quoted with some unimportant verbal changes.

Section 1190, page 447, makes it the duty of the commissioner of health to isolate cases of contagious or epidemic diseases.

The latter paragraph of Section 1218, page 455, provides for the isolation of contagious or communicable diseases found in hospitals.

Section 1214, page 453, provides:

"It shall be unlawful for any person, firm, association or corporation other than the regularly constituted authorities of the United States, the State of Illinois, the County of Cook or the City of Chicago to open, conduct, manage or maintain any hospital as defined in this article within the corporate limits of the City of Chicago without first obtaining a license therefor as hereinafter provided."

The following section 1215 prescribes the character of the investigation to be made before the license is to be granted.

Before answering the questions put, in the light of these

provisions, it will also be well to call the attention of your correspondent to the fact that apart altogether from the provisions of the ordinances, there is a general jurisdiction in Courts of Equity to enjoin the building of a hospital, or the user for a hospital of an existing building, within the limits of a large city, where, under all the circumstances the court is of the opinion that such a user would work a wrong to adjoining residents or property owners. See the case of *Deaconess Hospital v. Bontjes*, 207 Ill. 553, where the subject is discussed by the Supreme Court of Illinois.

We do not understand, however, that our opinion on this phase of the question is asked for. We shall therefore dismiss it with the observation that if the selected neighborhood were built up to any considerable extent, whether with residences or with flats, the neighbors would probably object very strenuously to having their children playing upon the streets with children afflicted by the kind of diseases your correspondent specified, and would probably go into equity for relief if they could not obtain it through the city ordinances.

Taking now the questions in their order:

1. If the Frances Juvenile Home were to purchase a building now being used for hospital purposes, or which had recently been so used, could it obtain the hospital privileges with the purchase; in other words, could the hospital owners transfer with the title to the property the hospital privileges; or would it be necessary to procure frontage consent?

Answer: The answer to this question must depend upon the relation between the character of the existing user as a hospital and the character of the proposed new user as a hospital. If the purchasers propose to conduct a hospital of the same general class as that which had already been conducted on the premises, there would be no need to get new frontage consents. But, if the original frontage consents had been for the maintenance of a hospital from which contagious or communicable diseases were to be excluded, and if the purchasers propose to treat such diseases in the hospital which they propose to maintain on the premises, they could not maintain such a hospital under the original frontage consents. Whether the diseases which your correspondent specifies are to be classed

as contagious or communicable is a doctor's question rather than a lawyer's question.

It is further to be noted in answer to this question that the purchasers would have to obtain from the proper city authorities a new license to maintain their hospital on the premises. Under section 1214 quoted above this license is certainly personal, based on inquiries as to the competency of the parties as well as the purposes for which the hospital is to be used. It could not be transferred to a purchaser irrespective of the fitness of such purchaser to conduct a hospital, and irrespective of the purposes for which he or she might propose to use the hospital.

2. If we were to purchase a house in a block that was entirely vacant, all around the block, save for the house we bought, and the block on the opposite side of the street on which the house faces is also vacant, would it be necessary to obtain the consent of any of the property owners of this vacant property?

Answer: The ordinance as quoted above does not require frontage consents in such a case as here supposed.

3. Would the same rules governing question No. 2, obtain in the event of our purchasing a piece of vacant and building a house, which would then be situated as in No. 2?

Answer: The same rule would cover; this obviously follows from the wording of the ordinance.

4. If less than one-third of the improved property in a square block consists of residences (the remainder being stores either with or without flats above) must any consent be obtained, and from whom?

Answer: The ordinance as quoted above only requires frontage consents where two-thirds of the buildings fronting on both sides of the street on which the proposed hospital may front are devoted to exclusive residence purposes. The condition supposed in this fourth question does not necessarily state whether or not two-thirds of the buildings fronting on both sides of the street are devoted exclusively to residence purposes. As to this question, therefore, we can only refer your correspondent to the terms of the ordinances as quoted.

In this opinion, we have assumed that the ordinance re-

quiring consents is a valid exercise of the powers conferred on the City Council. At the time this ordinance was passed Article 5, Section 1, Sub-section 77 of the Cities and Villages Act read as follows:

“To erect and establish hospitals and medical dispensaries and control and regulate the same.”

This section has been since amended by the Statute which was approved on July 5, 1911, so as to read as follows:

“To erect and establish hospitals and medical dispensaries, and to regulate hospitals, medical dispensaries, sanatoria and undertaking establishments, and to direct the location thereof.”

If any question arises as to the power of the City Council to enact the ordinance under the sub-section as it then stood, no doubt this will be met by the Council re-enacting the ordinance under the powers conferred upon it.

Yours respectfully,

WILLIAM DILLON,
Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,
Corporation Counsel.

SEPTEMBER 26, 1911.

MR. FRANK W. SOLON, Acting Superintendent of Streets.

Dear Sir:

I have before me your letter of recent date requesting an opinion of this department as to whether the right of way of the Chicago & Alton Railroad at Kedzie avenue in this city consists of a strip of land one hundred feet in width with a twenty foot alley on either side thereof or whether, as shown by the city records, it is a sixty foot right of way with a forty foot street on either side.

It appears the Assistant Superintendent of Streets informed the Chief Engineer of the Railroad Company on July 25, 1911, that the Map Department of the city had been unable to find any record showing how the Railroad Company acquired the hundred foot right of way, leaving a twenty foot strip on either side, as shown by plans submitted to the Department of Streets for approval, and stated that unless the

Department of Streets could be shown conclusively that the plan of the Railroad Company was correct, it would not approve it. There is attached to the correspondence before me a letter from the Superintendent of Maps stating that he is unable to find any record of where the Railroad Company acquired the additional twenty feet on each side of its sixty foot right of way, and also stating that a sixty foot right of way appears from the recorded plat of the subdivision with strips forty feet wide on each side and designated as Wright street, the name being subsequently changed to West 37th street.

In response to the request for evidence as to how the Railroad Company acquired the hundred foot right of way with twenty foot strips on either side, there appears to have been no evidence offered by the Railroad Company to clear up this point with the exception of a letter from the Tax Agent of the Railroad Company to its Chief Engineer stating that the Railroad Company scheduled its right of way as one of a hundred feet in width and returned such schedule to the County Clerk and State Auditor, and that the taxes are paid upon the hundred foot right of way, and the opinion of M. J. Scrafford, Assistant General Solicitor of the Company, that the Company had title to the hundred foot strip.

There is also in the correspondence a plat of the *locus in quo* made by Assistant Engineer Draper of the Railroad in 1883 showing a hundred foot right of way together with a letter from that official to the General Manager of the Railroad Company stating that the map has been made by one of his engineers. It does not appear how long the Railroad Company has paid taxes upon the hundred foot strip, which I assume it has paid for a long term of years, and, although your communication states that the Company has been occupying this one hundred feet for some time, I am not advised by the document before me as to how long this occupation has continued nor what, if any, improvements have been located thereon, but from independent investigation I learn that physical possession of the strip has been maintained by the Company for over thirty years and that for over fifteen years it has maintained four tracks thereon. It does not appear

that any of the tracks of the Railroad Company are situated upon the forty foot strips on either side of the sixty foot right of way as shown by the original plat of the subdivision and the charter of the Chicago & Joliet Railroad Company, the predecessor in interest of the Chicago & Alton Railroad Company, gives to the Chicago & Joliet Railroad Company permission to occupy a right of way for two tracks (Statutes of 1855).

In the case of *Lee v. Town of Mound Station*, 118 Ill. 304, it is said:

“Assuming that there was a statutory dedication, and an acceptance by the public, the title to the property was vested in the corporation in trust for public use. The corporation held it in its governmental capacity only, and could therefore invest private parties with no rights in it inconsistent with the public use, and the Statute of Limitations would not, therefore, run in favor of a private party, to bar the rights of the public.”

In the case of *Shirk v. City of Chicago*, 195 Ill. 298, it is said (p. 312):

“It has always been the doctrine of this court, that the Statute of Limitations does not run against a municipal corporation in respect to property held for public use. (*County of Piatt v. Goodell*, 97 Ill. 84; *Lee v. Town of Mound Station*, *supra*; *Greenwood v. Town of La Salle*, 137 Ill. 225; *City of Joliet v. Werner*, 166 *id.* 34; *Jordan v. City of Chenoa*, *id.* 530; *City of Sullivan v. Tichenor*, 179 *id.* 97; *Village of Itasca v. Schroeder*, 182 *id.* 192.)”

In the case of *De Kalb v. Luney*, 193 Ill. 185, the court say:

“Adverse possession of a portion of the street by the appellee and those in the line of his title or possession, no matter how long continued, had no effect, by reason of the provisions of the Statute of Limitations, to bar the right of the city to be restored to possession of the street to the full width thereof.”

It thus appears that the mere adverse possession by the railroad of the strips in dispute would not bar the city's rights. As to whether the strips had been abandoned by the city, the court say in *Shirk v. City of Chicago*, *supra*:

“So far as the matter of abandonment is concerned, it is well settled in such cases that there must not only be

an apparent abandonment by the public, but an intention to abandon must be established by the evidence; and such intention must be clearly and satisfactorily proved. (*Town of Lewiston v. Proctor*, 27 Ill. 414; *Elliott on Roads and Bridges*, sec. 972; *Horey v. Village of Haverstraw*, 124 N. Y. 275.”

In order to create an equitable estoppel against the city or the public, in addition to mere possession, it must appear that structures or improvements on the street of such character have been erected by the private property owner that it would entail additional loss upon him in case the public should assert its right to repossess itself of the premises, and that the action of the public authorities has induced the placing of such improvements by the person asserting rights against the public.

City of Joliet v. Werner, 166 Ill. 34;

Jordan v. City of Chenoa, *id.* 530;

Village of Itasca v. Schroeder, 182 *id.* 192;

City of De Kalb v. Luney, *supra*.

As to any acts of non-abandonment by the municipality, I find that on January 26, 1874, the trustees of the Town of Cicero passed an ordinance vacating Wright street from Western avenue to the west line of the alley running north and south between Western avenue and Hart avenue, and that the same board of trustees February 14, 1876, adopted a resolution vacating

“the forty foot street running east and west on the south side of the Chicago & Alton right of way between Sacramento avenue and Pierson avenue, and also the forty foot street running along the north side of the Chicago & Alton right of way from Kincaid street to Blanchard avenue, and the forty foot street on the south side of the Chicago & Alton right of way between Kincaid street and the east line of Block nine (9) in Adam Smith’s subdivision”;

and also that said board on October 28, 1882, ordained that the name of Wright street be thereby changed to 37th street.

These legislative acts, in my opinion, indicate an intention on the part of the Town of Cicero to accept the dedication of Wright street as a forty foot street on either side of the sixty foot right of way of the Chicago & Alton Railroad Com-

pany. Nor has any attitude of the municipality indicating an intention to abandon this street been shown since the annexation of the Town of Cicero to the City of Chicago in 1889.

I find that by special assessment ordinance, confirmed by the County Court, docket No. 32175, not only is Block 9 in Adam Smith's subdivision assessed as an entirety for a sidewalk on South Albany avenue, thus including as private railroad property forty feet which had been vacated by the ordinance hereinbefore mentioned, but that other action had been taken by the City Council of the City of Chicago showing the intention to retain this street as a public thoroughfare.

In assessing the south forty feet of Block 9 as private railroad property, it is evident that the city authorities could not have included these forty feet as right of way, because under the law such right of way is exempt from assessment and consequently the authorities recognize the vacation of said south forty feet previously made by the Town of Cicero. Moreover, street intersections were assessed for at the corner of South Albany avenue and Thirty-seventh street and South Kedzie avenue and Thirty-seventh street at the corners of Lots 1 and 24 in Block 10 in Smith's subdivision. These street intersections are at a point which provide for a forty foot width of Thirty-seventh street on the north side of the Alton right of way.

The action of the authorities of the City of Chicago charged with the duty of spreading an assessment for public improvement on South Albany avenue and Kedzie avenue in recognizing Thirty-seventh street as a forty foot street shows conclusively that the city authorities still regarded Thirty-seventh street as a forty foot street and not as a twenty foot street, as claimed by the Railroad Company. We thus find the action of the municipal authorities from 1874 down to 1907 in harmony as recognizing a forty foot street in Thirty-seventh street.

In view of these facts I can not see how there can be said to be any abandonment by the authorities of this street in its present width of forty feet.

I am informed by the Map Department, which has inves-

tigated the question, that the original plat of dedication made prior to 1870 shows the right of way of the Alton road as of sixty foot. This plat was made by Foster, a surveyor, and filed with the dedication instrument of Rees. Whether or not this dedication instrument complied with the Statute of 1845 so as to be a statutory dedication of the streets and alleys in the plat designated, the subsequent filing of Adam Smith's plat in 1871 constituted a statutory dedication. If the Railroad Company acquired any rights beyond a sixty foot strip for right of way purposes, I am of the opinion that these were inoperative as against the owner's recording of a statutory plat in 1871. The owner, Adam Smith, subsequently recorded other plats in Rees' subdivision, in all of which he recognized a forty foot street on either side of the sixty foot right of way of the Alton road.

It thus appears that from an early date the owners of various subdivisions have shown an intention to dedicate to the city a forty foot street on either side of a sixty foot Alton right of way. This forty foot street was early recognized and accepted by the Town of Cicero, which acceptance has subsequently been confirmed and participated in by the City of Chicago after the annexation of the Town of Cicero.

The mere fact that the Railroad Company has illegally taken possession of and fenced in a hundred foot right of way will give it no prescriptive rights as against the public.

I am of the opinion that the strip in question is, and has always been, a public street and that no city official is authorized to approve any document, the effect of which would be to confirm or assure a fee title in such strip in the Railroad Company. The conclusion necessarily follows that the position assumed by the Assistant Superintendent of Streets in refusing to approve the plans submitted by the Railroad Company is a correct one.

All correspondence upon this subject and plans submitted therewith are returned with this communication.

Very respectfully yours,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,
Corporation Counsel.

SEPTEMBER 27, 1911.

HON. EDWARD COHEN, City Collector.

Dear Sir:

Your letter of September 21st *in re* issuance of a pool table license to Harmes Baba has been referred to me for attention.

Your letter and the police report attached thereto show that the applicant has a good record, but that the Police Department has recommended that the license be not granted because of the fact that the location is in wha its "mostly a residence neighborhood."

Chapter XI of The Chicago Code of 1911 covers the subject of billiard and pool tables and bowling alleys and consists of four sections.

Section 167 makes a license necessary.

Section 168 provides for the method in which applications shall be made for licenses, fixes the license fee and provides that upon such application being made and the fee paid "the Mayor shall issue or cause to be issued to such applicant a license."

Section 169 makes it necessary to obtain frontage consents of a majority of the property owners on both sides of the street between the two nearest intersecting streets for the operation of a bowling alley where two-thirds of the buildings on both sides of such street are used exclusively for residence purposes.

Section 170 forbids minors, under the age of eighteen, from frequenting such billiard or pool rooms.

It will be noted that the section regarding frontage consents applies to bowling alleys only although it is part of the chapter covering billiard and pool tables, and that even in case of a bowling alley frontage consents are necessary only when two-thirds of the buildings on the street are used *exclusively* for residence purposes, and in such cases the consent of a majority of the property owners would make it proper to issue a bowling alley license.

There being no provision prohibiting billiard and pool rooms in residence neighborhoods, and there being no claim that the applicant in this case is not a proper person to

conduct a billiard or pool room, or no reason to believe that he would not conduct the same in an orderly and proper manner, I fail to see how you can refuse to issue the license in question.

You will also note that Section 168 does not *merely authorize* the Mayor to issue such a license, but states that he "*shall*."

The Supreme Court has held that where an applicant has brought himself within the provisions of a licensing ordinance and the municipal authorities refuse the license, the applicant can compel the issuance of the license by mandamus.

East St. Louis v. Wider, 46 Ill. 354;

Zanone v. Mound City, 103 Ill. 552.

I would, therefore, advise you that the license to Harnes Baba should be issued.

I am enclosing herewith your letter together with the petition of residents in the neighborhood protesting against the issuance of the license, and also the application for the license.

Respectfully yours,

S. CRAWFORD ROSS,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

SEPTEMBER 27, 1911.

VERNON L. BEAN, Esq., Secretary, Board of Examining Plumbers, Chicago.

Dear Sir:

Replying to your letter of August 30, in the matter of arresting without a warrant for violation of plumbing ordinance and containing an excerpt from a former opinion by Mr. Olson of this office, I beg to advise you that the opinion of Mr. Olson is perhaps misleading. The question is best answered in the language of the Statute itself. The act constituting the Municipal Court contains in Section 312, this clause:

Fourth: "Any police officer of the City of Chicago may arrest on view any person who may be seen by such police officer in the act of violating, within the City of Chicago, *any* ordinance of said city, or *any* ordinance of

any municipal corporation situated, in whole or in part, within the limits of said city, whenever such violation is, by such ordinance, made punishable by fine or otherwise. Any person so arrested shall, without unnecessary delay, be taken by such officer to some convenient branch of the Municipal Court and such police officer shall thereupon make and file a complaint in writing under oath against such defendant of the violation by such defendant of such ordinance and such defendant shall thereupon be dealt with according to law in the same manner as if he had been arrested in the first instance under a warrant lawfully issued."

It will thus be noted that a police officer is not bound to believe that there is reasonable ground to believe the party violating an ordinance will escape unless arrested as it would seem your former opinion held.

There are, however, more serious objections to the practice of arresting this class of violators without a warrant.

The ordinance, Section 1775, provides:

"Any person now engaged in, or hereafter engaging in, or working at the *business* of plumbing in the City either as a master plumber or employe plumber, or as a journeyman plumber, * * *"

To permit an arrest on view, all the circumstances constituting the violation must be present at the time of the arrest. The ordinance does not require that the certificate should be prominently displayed and therefore the officer who makes the arrest is bound to establish his proof of the violation of the ordinance by collateral inquiry. He must get the knowledge from some source other than what is enacted before him.

In *Shanley v. Wells*, 71 Ill., page 78, a case much cited throughout the states, the subject of an arrest on view was before the court. The defendant, an officer, who was sued for assault and false imprisonment, offered to prove what he had been told by other officers concerning the habits and conduct of the plaintiff prior to his arrest. The court decided, however, that this evidence was not proper.

The court further says:

"It was certainly incumbent on the defendant to show that the offense was in fact committed in his pres-

ence. The burden was on him to establish that fact by satisfactory evidence. What may have been his motives in making the arrest or *what the information he received from others*, would, obviously, therefore, be unimportant, as neither could contend to prove the commission of the offense of vagrancy in the presence of the defendant."

In *Hughs v. State* (1907), 2 Ga. App. 29, the court says:

"If the person arrested did in fact have a pistol concealed about his person the fact not being discoverable without a search the offense of carrying it was not committed in legal contemplation in presence of the office."

Some states have sustained the right of an officer to arrest on view a violator of an ordinance not amounting to a breach of the peace where the statute authorized such arrest. I can find no expressions, however, upon a license case. In doubtful cases, I believe the question would be resolved against summary arrest. There are many decisions denying the right at common law to arrest on view for misdemeanors not amounting to a breach of the peace. It is epitomized in *Vorhees on Arrest*, page 79, as follows:

"There is a tendency on the part of the courts to look with disfavor upon legislative enactments that authorize arrests without warrants for misdemeanors not amounting to breaches of the peace, as interfering with the constitutional liberties of the subject."

Another objection which I think is more difficult arises from the wording of the ordinance which makes the offense consist of "working at the *business* of plumbing." An ordinary meaning of the expression, "at the business", I believe is that a person working at the business must be carrying on this occupation for a livelihood. It must be for the time his vocation. It is composed of a number of elements and there must be a condition of some duration before a person can be said to be working at the business. One separate act has always been held not to come within the expression of "doing business."

In prosecutions under the ordinance here under discussion, we have lost cases in which the defendant showed that he did not hold himself out as a plumber but was a janitor doing repairs on his building or a man installing plumbing in his own house.

In *O'Neil v. Sinclair*, 153 Ill. 525, the court says:

"But we are of the opinion that the mere act of negotiating this one sale, so long as the plaintiff was not in the business of selling or negotiating sales of real estate, did not constitute him a real estate broker or bring him within the purview of the ordinance. It will be noticed that the first section of the ordinance makes it unlawful for any person to exercise, within the city, the business of a real estate broker, and the third section defines the term 'real estate broker' as meaning 'one engaged in selling or negotiating sales of real estate belonging to others, for a commission or other compensation. We think, it plain that these provisions apply only to persons making the sale or negotiation of sales of real estate of others a business or occupation, and not to one who is not in the business but negotiates a single sale. This view is sustained by numerous authorities, and we are referred to no cases where the contrary rule is laid down."

How, therefore, can a person be said to be doing business on view of the officer? The officer could not be heard to testify what he had seen the offender do on previous occasions, he being limited to what actually transpired at the time of the arrest, nor could he testify what another told him about the non-existence of a license.

In the *Shanley* case, *supra*, the court says:

"It may well be questioned whether, from the peculiar elements which are essential to constitute the offense of vagrancy, it belongs to the class of offenses for which an arrest may be made without a warrant; but even conceding that it does, it was certainly incumbent on the defendant to show that the offense was in fact committed in his presence. The burden was on him to establish that fact by satisfactory evidence. What may have been his motives in making the arrest, or what the information he received from others, would, obviously, therefore, be unimportant, as neither could tend to prove the commission of the offense of vagrancy in the presence of the defendant.

The defense of justification not being proved, the defendant's act stands as a wanton violation of the plaintiff's rights—an inexcusable trespass, for which the plaintiff is entitled to damages."

It should further be borne in mind that the question here discussed is as to the right to make the arrest and that

no question of the ultimate conviction or acquittal of the defendant can affect the question.

I am therefore of the opinion that a person can not commit the offense of "working at the business of plumbing" without a license on view of an officer.

The writer realizes the great handicap under which your board operates and the futility of a summons in many of these cases, but we can not be deaf to the demand of the municipal judges in their campaign to stop prosecutions for misdemeanors other than by summons as expressed so emphatically by Judge Gemmill, and no further arrests without a warrant should be advised by your Board.

Respectfully submitted,

GEO. L. REKER,

Assistant Corporation Counsel.

Approved:

(Signed) WM. H. SEXTON,
Corporation Counsel.

SEPTEMBER 27, 1911.

HON. JOHN E. TRAEGER, Comptroller.

Dear Sir:

I have your communication of September 12th, asking an opinion from this department as to whether the city should pay to the Commercial Bank of Blue Island, Illinois, certain special assessment interest coupons now due upon special assessment bonds issued by the former Village of Morgan Park, before the litigation now pending in our courts contesting the annexation of that territory to Chicago is finally determined.

I beg leave to state, funds collected from a special assessment constitute a trust fund and is held by the city in trust with which to pay the contractor for the improvement, or to pay the bonds issued therefor, and should not be used by the city for any other purpose, and this particular fund in question remitted by the County Treasurer to the city on account of special assessment collections, made subsequent to annexation, for improvements made by the former Village of Morgan Park, should be treated in the same manner as if the im-

provements had originally been made by the city, and when this money is so used to liquidate the indebtedness for which it is collected no one can complain, the former Village of Morgan Park, even if successful in the outcome of the annexation contest cases now pending, could not complain of the payment of this money by the City of Chicago in liquidation of this obligation incurred by that village, it being the only obligation for which this fund could, under the law, be used by either the city or the former Village of Morgan Park.

The liability of the city under the law is limited to the amount of the special assessments actually collected, and which have not been paid over.

Conway v. City, 237 Ill. 135.

I am therefore of the opinion that you can use this special assessment fund in payment of the obligations for which it is intended, namely: in paying the special assessment interest coupons, also bonds when due regardless of the final determination of the annexation contest cases, and without incurring any liability on the part of the city on account thereof.

Yours respectfully,

P. W. SULLIVAN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

SEPTEMBER 28, 1911.

HON. L. E. McCANN, Commissioner of Public Works.

Dear Sir:

In a communication to this department from Joseph O. Kostner, Esq., Deputy Commissioner of Public Works, dated the 25th inst., the inquiry is made as to the right of the Lincoln Park and South Park Commissioners to fill in, etc., along the harbor lines established by the City of Chicago, without obtaining the permit required by the harbor ordinances of the city.

In order that this subject may not require further con-

struction, the following rules of law are laid down for the guidance of your department:

1. By the Statutes of the State the power of regulating the use of the harbor is vested in the city. Pursuant to this power the City of Chicago has adopted a comprehensive ordinance which fixes the extent and limits of the harbor and provides ample regulations for its management and preservation.

2. The General Assembly, at its recent session, passed "An Act to enlarge the power of cities in relation to harbors, canals, wharves, docks, piers, slips and other harbor structures, facilities, improvements and utilities constructed or operated in connection therewith, to authorize the acquisition and condemnation of property and the use, occupation, reclamation and acquisition of the submerged lands of the State in carrying out such power, and to repeal all acts or parts of acts in conflict therewith." Without quoting at length from this act it suffices to say that the powers of the City have been materially enlarged by its provisions, and are superior to any other rights theretofore granted, (when the same have not been exercised), upon the passing of an appropriate ordinance by the City Council.

3. By the Acts in question the City has undisputed jurisdiction over the harbor for the purpose of aiding and promoting navigation.

4. By the Act of 1895 and subsequent park acts adopted in 1903 and 1907, the General Assembly has enabled park commissioners having control of any park bordering upon public waters in this State to enlarge the same from time to time by filling in submerged lands, the title to which is granted to such park authorities for such purpose only.

5. By these Acts Park boards have acquired the title to submerged lands and possess the power to use such lands for park purposes. Riparian owners are therefore compelled to obtain the consent of such park boards before they may construct wharves, docks or piers into the lake.

6. By construing all these acts so as to harmonize their provisions, we arrive at the following conclusions:

(a) Park Commissioners may fill in submerged lands for

park purposes and may prevent the erection of structures into the lake by riparian owners.

(b) The City of Chicago having control of the harbor for purposes of navigation, has the power to prevent encroachments and obstructions upon the same, no matter by whom attempted.

(c) Park boards as well as individuals are subject to this regulation on the part of the city and all without exception, are compelled to submit to the city's jurisdiction as laid down in the harbor ordinance.

The rights of the public to the free and unobstructed navigation of the public waters, as well as the city's power of regulation and control over the harbor make the issuance of the permit a condition precedent to the undertaking of any work along the harbor lines.

Respectfully submitted,

NICHOLAS MICHEL,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

SEPTEMBER 29th, 1911.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Replying to your request for an opinion as to your right to revoke saloon licenses, without first having received a complaint, or a report by the department of police, in respect to the saloons affected, I beg to say that Section 1536 of the Chicago Code of 1911 provides that any saloon license granted may be revoked upon written notice by the Mayor—

(1) Whenever it shall appear to his satisfaction that the party so licensed shall have violated any provision of any ordinance of the city relating to intoxicating liquors, or any condition of the bond provided for in Section 1526, Art. I, Chap. XLII of the Chicago Code of 1911, on the subject of "Liquor;"

(2) Upon complaint to the Mayor that any place licensed as a saloon is a resort of disreputable persons, the Mayor shall cause an investigation to be made as to

such complaint, and if found to be true, he shall forthwith revoke the license issued to keep such saloon;

(3) Upon report to the Mayor by the department of police that any saloon is the resort of disreputable persons, the Mayor shall at once revoke the license of the keeper of such saloon.

It will be observed that the complaint upon which the Mayor shall cause an investigation to be made, and also the report by the department of police upon which the Mayor shall revoke the license, are both limited to cases where the saloon "is the resort of disreputable persons."

The Mayor's power to revoke is not, however, limited to cases where the saloon is a resort of disreputable persons, but as appears by said Section 1536, is much broader and extends to all cases where it shall appear to his satisfaction that the party licensed has violated any provision of any liquor ordinance, or any condition of the bond above referred to.

I am of the opinion that the information in regard to the facts which may serve to satisfy the Mayor that any provision of the liquor ordinances, or any condition of the bond, have been violated, may be based upon personal knowledge of the Mayor, or be derived from any other source that he may deem credible.

Each saloon license issued by the City of Chicago has the following provision printed upon its face:

"Nevertheless, this license, with all the rights under it, is subject to revocation at the discretion of the Mayor and this license, with all the rights under it, shall terminate absolutely upon the notice of said revocation being left at the bar and the person to whom it is issued shall stand in the same position as if he had not taken out any license."

The Supreme Court has held in several cases that the licensee by accepting a license containing the above quoted provision, is held to have assented to its terms and conditions.

Malkan v. City of Chicago, 217 Ill. 471;

Schwuchow v. City of Chicago, 68 Ill. 444.

I am of the opinion that you have authority to revoke a saloon license whenever it shall appear to your satisfaction from any source that any of the liquor ordinances, or any con-

dition of the bond referred to, have been violated, irrespective of whether any complaint or any report of the police department has been made to you.

Yours respectfully,

BRYAN Y. CRAIG, (Signed.)
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON, (Signed.)
Corporation Counsel.

SEPTEMBER 29, 1911.

HON. DENNIS E. EGAN, Alderman 9th Ward.

Dear Sir:

Your verbal request for an opinion as to the right of the city to expend the moneys collected for vehicle licenses in the respective wards in which the licensees reside, for the improvement and in repair of streets and alleys, may be answered as follows:

Subdivision 96 of Section 1 of Article 5 of "An Act to provide for the incorporation of cities and villages," provides that the city council shall have power "to direct, license and control all wagons and other vehicles conveying loads within the city, or any particular class of such wagons, and other vehicles, and prescribe the width and tire of the same, the license fee when collected to be kept as a separate fund and used only for paying the cost and expenses of street or alley improvements or repair."

Pursuant to the powers thus granted the city council, after prescribing the license fees, has ordained as follows:

Section 2719, Municipal Code, 1911:

"* * * All revenues derived from such license fee shall be kept as a separate fund and used for paying the cost and expenses of street or alley improvement or repair.

The city collector shall keep a separate account by wards showing the amount of revenue obtained from each ward in which any vehicle not drawn by animal power is kept when not in use, and in which any animal or animals are kept drawing any wagon or vehicle for which a license is procured under the provisions of this article.

Fifteen per cent. of the total revenues thus obtained shall be set aside, to be expended in the discretion of the commissioner of public works and under his direction, for the repair of such streets upon which there is an unusually heavy amount of traffic.

So much of the remaining eighty-five per cent. of the revenues obtained from each ward, as, in the discretion of the commissioner of public works, may be needed for immediate use, shall be expended under the direction of said commissioner for the repair of streets and alleys in such ward, and the balance thereof shall remain to the credit of such ward account to be used as occasion requires."

By these provisions of the Municipal Code the city council has plainly provided for the expenditure of the wheel tax fund and has given power to the commissioner of public works to expend the same in his discretion, first, for the repair of such streets upon which there is an unusually heavy amount of traffic up to fifteen per cent. of the total revenues in any ward, and second, so much of the remaining eighty-five per cent. thereof as may be needed for immediate use for the repair of streets and alleys in such ward, and has provided that the balance thereof shall remain to the credit of the ward account to be used as occasion requires.

Yours very truly,

WM. H. SEXTON,
Corporation Counsel.

SEPTEMBER 30, 1911.

HON. JOHN MCWEENY, General Superintendent of Police.

Dear Sir:

Lieutenant Delaney of the Vehicle Department has requested an opinion from this office as to whether or not the city can compel The Daily News to use licensed operators for the automobiles rented from the Motor Transportation Company and used by The Daily News to carry papers throughout various parts of the city.

Our information is, that the Motor Transportation Company is engaged in the business of delivering merchandise for the public by automobiles throughout the city. This Company has an arrangement with The Daily News under which The

Daily News rents five automobiles from week to week, for the use of which, The Daily News pays compensation at so much per week for each automobile used. These automobiles are used exclusively by The Daily News for the delivery of its newspapers throughout various parts of the city. The names "The Daily News" and "Motor Transportation Company" are conspicuously printed upon these automobiles, which are operated by men who are in the employ of The Daily News exclusively. These automobiles are kept by the Motor Transportation Company in their own building, and are called for by The Daily News employes, and returned by these same men at the close of day. The question which the Vehicle Department is interested in is whether the operators of these automobiles should not be "licensed operators."

Section 2696, Article 12 of Chapter LXXIX "Vehicles" provided as follows:

"Operators of Public Motor Vehicles. License required for operator.) No motor vehicle engaged in the transportation of passengers, merchandise or any other purpose *for hire or reward* shall be propelled or driven upon or along any street, alley or other public way in the city unless the person in charge of such vehicle and who is acting as the operator thereof (such person being herein referred to as 'operator') and as such operator controls the means of propulsion of any such vehicle, shall be a person duly examined in the manner hereinafter provided and found competent and qualified to operate or drive such vehicle through the city streets without endangering the public safety, and duly licensed as provided for herein."

It seems to us that this Section does not apply to operators employed by private individuals or corporations who rent automobiles for the delivery of their own merchandise. This section is intended to reach operators of "*Public Motor Vehicles*" which are engaged in the transportation of passengers, or which do a general teaming business of transporting merchandise for the public for hire or reward. In the case of The Daily News, the operators deliver newspapers for The Daily News only and no charge whatever is made for this delivery. We are therefore of the opinion that the operators in charge of such automobiles would not have to be licensed operators.

We desire however, to call your attention to Article 8, of the same chapter which regulates "Garages."

Section 2683 is as follows:

"Garages defined.) The word 'garage' as used in this article shall be held to mean, and is hereby defined as meaning, any barn, stable, building or other place within the city where *automobiles, autocars or any similar self-propelled vehicles are kept or let for hire or reward to any person*, whether such vehicle be so hired out or let *with or without* an operator for same, or where such vehicles are kept ready for use and where rent is paid to the keeper thereof for such keeping."

We believe that the arrangement by which the Motor Transportation Company rents out its automobiles to The Daily News even though without an operator, would constitute the Motor Transportation Company as operating a "Garage," and we are therefore of the further opinion that the Motor Transportation Company would have to comply with all of the ordinances relating thereto.

Respectfully submitted,

MAX KORSHAK,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

OCTOBER 6, 1911.

EDWARD COHEN, Esq., City Collector.

Dear Sir:

Your request for an opinion as to whether certain property situated on the north side of Wilson avenue and immediately west of and adjoining the right of way of the Chicago, Milwaukee & St. Paul R. R. Co. is either prohibition, local option or anti-saloon territory was referred to me.

I have investigated and find that this property, which was heretofore used as the depot and grounds known as Sheridan Park Station on the Chicago, Milwaukee & St. Paul Ry. is not on the right of way of this road, nor on any portion of what was formerly known as Stella Street, said ground and structure being entirely west of said right of way. The only

prohibition or local option district which touches the immediate neighborhood is what is known as the Buena Park local option district, and the ordinance defining that gives this right of way as the Western boundary. Another local option district extends down from the north to a point about two blocks from there, but does not affect the property in question.

The district west of the railroad right of way in that immediate neighborhood is open territory. My attention was called to the fact that no saloons exist there, but this may be due to other causes, for instance a restriction in the deeds prohibiting the sale of liquor. If any such restrictions exist it is not on account of any law or ordinance, and this Department, in furnishing an opinion, cannot take cognizance of them. There is no park or boulevard nor school or church near enough to prohibit the location of a dramshop on the property in question. It is not in a residential section as defined by law.

In tracing the right of way mentioned above I find that the Chicago, Milwaukee & St. Paul Ry. succeeded to the rights of the Chicago & Evanston R. R. Co. There were no liquor restrictions placed in the ordinance granting rights of way to either of these companies at any time. I also find that in the Act incorporating the Chicago & Evanston R. R. Co. the legislature gave it the right to "acquire, by donation, stock subscription or purchase, dispose of and convey, as they may deem expedient, real estate not to exceed in value, on hand at any one time, the capital stock of the company."

I am therefore of the opinion that the property inquired about is located in open territory.

You have also verbally requested an opinion from me as to whether a license could be issued in such a local option district as the Buena Park District, mentioned above, for a wholesale liquor dealer. In answer to that, I will say that in the particular district designated such a license could be issued, since the ordinance creating it only provides certain requirements for the keeping of a "dram shop" and there was no general law or ordinance of the City of Lake View which prohibited the selling of liquor.

This however, does not apply to all local option and pro-

hibition districts. It was held in the case of *People v. Harrison*, 191 Ill. 257, that the word "dram shops," as used in the statute providing for the continuing in force of all liquor ordinances of a municipality annexed to another city, is generic, and means the liquor traffic generally. Under this decision, therefore, there are districts where "dram shops" are prohibited or limited by ordinance, in which it would also be improper to issue a license for wholesale liquor dealers. But, as stated above, this decision does not affect the territory in question, and a wholesale liquor dealer could obtain a license therein without complying with the provisions relating to "dramshops."

Yours respectfully,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

OCTOBER 6, 1911.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Your inquiry as to whether there is any legal way by which the so-called free museums of anatomy about the city can be suppressed was referred to me for an opinion.

I assume that your question relates to the class of exhibitions to which the male public generally is admitted, where a large part of the displays are of an obscene character, presumably intended for educational purposes, but in reality meant to serve as an advertisement for a physician or as an adjunct to some institution where medical treatment can be obtained.

There is no statute or ordinance now in force which would be effective in dealing with these concerns.

Although I have not been able to find any case in which this particular class of shows was discussed, I am convinced that the city has ample power to deal with them in such a manner as to either make them unobjectionable or suppress them entirely.

Under its general police powers the municipality may deal with the subject as affecting public morals. It is also given express power under clause 41 of Section 63 of the Cities and Villages Act, which confers the right to license, tax, regulate, suppress and prohibit all exhibitions, shows and amusements.

Such an institution comes clearly within the above clause, even though admission to same is free. The Century Dictionary traces the word "museum" to the Greek word signifying a temple of the Muses, and the case of *Bostwick v. Purdy*, 5 Stew & P. (Ala.) 105, furnishes legal authority for such a classification. In fact, it has been recognized in our code, where museums are classified along with other places of amusement.

While our courts have held that there is some limitation on the city's power under this clause to suppress a lawful business like that of a theater, still this limitation cannot be invoked to maintain an exhibition that is obscene.

Strictly analogous to this subject is the suppression of publications devoted largely to the dissemination of news relating to criminal and immoral conduct. Laws aimed at that evil have been upheld in the face of the constitutional provision guaranteeing the freedom of the press, and without regard to the motive for the publication.

State v. McKee, 73 Conn. 18.

In re Banks, 56 Kan. 242.

My conclusion is, therefore, that an ordinance can be framed that will stand the test of legality and will dispose of the evils now existing in these places. The difficulty will be not so much the question of the city's power in the premises but the likelihood of interfering with exhibitions actually instituted for educational purposes.

Even this difficulty, however, can be overcome by making the purpose of the exhibition one of the factors entering into the determination of its lawfulness. The law draws a distinction in such a case between an enterprise intended for gain and one created in the interest of science.

"The question whether a publication is obscene does not depend upon its being true or false, but upon its

tendency to inflame the passions and debauch society. *

* * A book purporting to give medical instruction may be amenable to the law as an obscene publication; and the testimony of scientific men that its statements and descriptions are true will not be a justification, if the jury are satisfied that the purpose and effect of the publication was to debauch society for the purpose of gain rather than to benefit the public."

Com. v. Landis, 8 Phila. 453.

Applying the rule stated in the above excerpt in the case of museums of this character, as I have no doubt our courts would, there remains still the necessity of guarding against the claim on the part of the proprietors that they are not operating them for gain. But while no admission fee is charged and they assume the guise of scientific institutions, the object in view is quite transparent, and I believe an ordinance can be so framed that it will include all objectionable places.

Yours respectfully,

(Signed.) LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

(Signed.) WILLIAM H. SEXTON,
Corporation Counsel.

OCTOBER 6, 1911.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

I have your communication requesting an opinion from this department as to whether the General Superintendent of Police can legally reinstate John Jurs, a former patrol sergeant, who resigned his position from the force November 1, 1909.

It appears from a communication of the General Superintendent of Police, transmitted with your request, that Jurs voluntarily resigned his position on November 1, 1909. The records of the Police Pension Board show that since that date Jurs has been upon the pension roll as a superannuated officer, namely, one who is over fifty years of age and has served twenty years upon the police force. During his service upon the police force Jurs was what is known as a "hold-over," or

an officer who was not appointed a policeman under and by virtue of the provisions of the Civil Service Act.

Section 4 of the amended Pension Act of July 1, 1911 provides that:

“Whenever any policeman of any such city, village or town shall become physically disabled while in and in consequence of the performance of police duty, said board shall, upon his written request, or without such request, if it deem it for the good of the department, retire such person from active service and order and direct that he be paid from said fund a yearly pension * * *; Provided, further, that whenever such disability shall cease such pension shall cease, and such person shall thereupon be reinstated in the department in the rank held by him at the time of his retirement.”

Section 6 of the same Act provides in part that:

“Whenever any policeman shall, after ten years’ service and while still in the service of such city, village or town, be legally adjudged to be insane and at such time shall have a wife or child, or children under the age of sixteen years, said board shall order and direct that a pension of one-half the salary * * * shall be paid to such wife * * *; Provided, however, that if at any time it be declared in the manner provided by law that such person is restored to reason, then such pension shall cease, and such person shall, in the discretion of said board, be reinstated in the department in the rank held by him at the time he was legally adjudged to be insane.”

Section 7 provides in effect that any person retired for disability shall report to the chief of police every month and in case of emergency may be assigned to such duty as the chief may direct and shall have no claim against the city for payment for such duty so performed.

None of these provisions are applicable to the case of Jurs for the reason that he resigned from the police force and his service thereon ceased not as a result of physical disability, but by reason of superannuation.

Nor is the position of Jurs aided by the provisions for voluntary retirement found in Section 3 of the act. This section provides that:

“Whenever any person shall have been or shall hereafter be appointed and sworn either as a probationary or

regular policeman, and shall have served for a period of twenty years or more in the police department * * * of such city * * * said board shall order and direct that such person, after his service in such police department shall have ceased, shall be paid a yearly pension," etc.

It will be noted that this section contains no provision for the reinstatement of the superannuated officer after resignation, nor does it render him amenable to any order or direction of the General Superintendent of Police. The police officer who voluntarily separates himself from the force and receives a superannuated pension is thus left without any connection of any kind with the police force and is subject to no rules, regulations or dictation or order of the police department. He can not be called upon to perform any duty in case of emergency, nor has the police department any control over his pension.

In passing it may be said, to illustrate the complete freedom of such a pensioner from the control of the department, that cases have arisen where officers having retired from the force and received superannuated pensions, have engaged in the performance of police duty in neighboring municipalities. He was not removed from the force by either the Pension Board or the General Superintendent of Police for the good of the service, but voluntarily resigned. His position since then, as regards the police force, has been one of complete separation and he stands in the same position as any private citizen.

In order to regain a position upon the police force it would be necessary for Jurs to comply with the provisions of the Civil Service Act in regard to examination and appointment by the Civil Service Commission in the same manner as any other person who desires to enter the classified civil service of the city.

Section 1945 of the revised code provides that:

"Any member of the department of police, receiving injury or becoming disabled while in the discharge of his duties, and by reason of, or as a consequence of, the performance of such duties, so as to prevent him from attending to his duties as such member of the department

of police, shall for the space of twelve months as such disability shall continue, receive his usual salary."

Beyond the fact that Jurs had not received an injury, the twelve months' period has already elapsed since his resignation.

In my opinion, a police officer who voluntarily retires from the police force and receives a pension as a superannuated officer, thereby renders himself ineligible to reinstatement in his former position, except as he may be able to obtain such position in the mode pointed out by the Civil Service Act.

Very respectfully yours,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

OCTOBER 9, 1911.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

You referred to this department a letter from Nelson L. Barnes, Esq., complaining of noise during the night on account of building operations at the corner of Cass and Ontario streets, with an inquiry as to whether there were any legal restrictions on such work between the hours of 10 p. m. and 4 a. m. I have been instructed to give you an opinion on the subject.

There is no law or ordinance now in force which in any way limits the hours of work on building operations. There is no doubt that, under its power to declare what shall be a nuisance and to abate the same, the city has a right to restrict building operations, especially when the same are attended with noise such as result from pile-driving or steam-shoveling, to reasonable hours.

Dillon on Mun. Corp., 4th Ed., Sec. 374.

By proper enactment the city authorities could be given the right to arrest offenders and to abate same by summary process. But such power must be exercised by ordinance, and cannot be invoked at the will of the city's officials.

The city authorities have some discretion, aside from any ordinances on the subject, over nuisances in general, and in extreme cases may even summarily abate same. It is hard to define this power in exact terms or to draw the line between what can be regarded as an extreme case and what must be looked upon as beyond summary control. The classification of a nuisance *per se* and that which is declared a nuisance by legislative enactment does not always hold. Generally speaking, I would say that in order to justify summary abatement without express enactment the nuisance must be either a nuisance *per se*, or of such a character that it indicates a wanton disregard of the comfort, safety or health of the public, thereby tending to create an emergency likely to result in a breach of the peace or immediate danger.

Nothing that is legitimately done in the erection of a building can be said to be a nuisance *per se*, and the noises attendant upon it, even at night, do not fall within the other class of cases mentioned above. It might be different if blasting operations were carried on, but there is a special ordinance covering that, so that it does not enter into this question.

Aside from noises resulting from explosions there are few attendant upon any lawful pursuit that are of such a nature that city officials can suppress them without express enactment.

It has therefore been found expedient to enact ordinances regulating same, as for instance the crying of wares, the transporting of rails, the playing of hand-organs, etc. But just as it would have been an improper assumption of authority to have taken action without an appropriate ordinance governing same in those cases, so it would be an unlawful exercise of discretion to suppress building operations during certain hours of the night without specific provision therefor in the ordinances.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

OCTOBER 9th, 1911.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

The communication of Mr. Ricard O'S. Burke in the matter of the above application of the Illinois Central Railroad Company to lay about fifteen hundred feet of pipe and place four hydrants for fire protection on the pier west from Lake Michigan and between 12th and 13th streets has been referred to me for reply.

Attached to this letter is a plat showing the location for such pipe and hydrants as required by ordinance, the original application and the form of special permit No. 6078-A.

I first beg to note (a) that the phrase "of pipe" has been omitted from the application after the figures and word "1,500 ft.," and (b) that the permit in addition to including fifteen hundred feet of water pipe and four hydrants also provides for "one connection for fire boat." The connection for fire boat is not included in the application. The application should be properly amended to correct these two omissions. I have caused an examination to be made by an investigator from this office and am informed by him that it will not be necessary to drive any new or additional piles in order to lay this pipe and install the four hydrants.

As shown by sketch attached to the application the water pipe, hydrants and fire boat connection are to be laid and installed in and about a wharf or pier projecting into the lake east of the Illinois Central depot at 12th street. This wharf or pier was built by the Illinois Central R. R. Co. in 1885, and February 3rd, 1902, was finally adjudged by the Supreme Court of the United States to be the property of the Illinois Central R. R. Co.

Illinois Central R. R. Co. v. Illinois. 146 U. S. 387;

Illinois v. Illinois Central R. R. Co., 184 U. S. 77.

The opinions in both of these cases contain what is designated as the "Morehouse Map" which shows the location of this wharf or pier.

I beg to suggest that you might cause a survey to be made to determine whether the locations for the water pipe, hydrants and fire boat connection, as designated on the at-

tached sketch, are within the limits of the pier, as shown by the Morehouse Map, and as decreed by the Supreme Court of the United States, or whether these locations are upon and within additions subsequently made to the pier. Such additions, if any should be found to exist, are not the property of the Illinois Central R. R. Co.

I have examined the special permit No. 678-A attached to the application and am of the opinion that it meets the requirements of the city ordinances upon this subject, and protects the rights of the State of Illinois and the City of Chicago in the matter of pending litigation.

I return herewith Mr. Burke's letter, dated September 14th, 1911, the said sketch or plat accompanying the same and the original of special permit No. 678-A, dated September 12, 1911.

Respectfully submitted,

J. G. SKINNER,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

OCTOBER 9th, 1911.

HON. LAWRENCE E. MCGANN, Commissioner of Public Works.

Dear Sir:

The communication of John D. Riley, Examiner of Subdivisions, in the matter of the foot bridge across Bernard street, and bearing date of July 14th, 1911, has been referred to me for answer.

This communication sets forth that there is a foot bridge at Bernard street across the Chicago River; that said bridge was not built by and is not under the control of the Bridge Division, and that the same is in a dangerous condition. It is further set forth that the bridge was built by the employees of the Parental School. Attached to Mr. Riley's letter is a plat of dedication which shows that the land immediately north of the river and opposite Bernard street, as the same is platted to the south bank of the river at that point, is tendered to the city as a street.

The question submitted is whether approval of the plat followed by its recording, and the subsequent use by the public of the street as dedicated, in connection with the use of the foot bridge, will render the city liable in case of accident.

The approval of the subdivision and the spreading of the same upon the maps of the city and upon other public records, coupled with the knowledge of the city officials of the existence of this bridge, its present use by the public and its unsafe condition, together with its use for some considerable time subsequent to such approval, would constitute such competent facts and circumstances, which, when submitted to a jury, might warrant a finding that the bridge had been accepted by the city, even though the facts should show that it had been originally built by private parties.

Highway Commissioners of the Town of Rutland v.

Highway Commissioners of the Town of Dayton, 60 Ill. 58, 63 to 68;

Commissioners of Highways of the Town of Dayton v.

Commissioners of Highways of the Town of Rutland, 84 Ill. 379, 282.

I therefore suggest that you cause an investigation to be made to determine whether the city shall take over and be responsible for the repair and maintenance of this bridge, or whether the same shall be closed. If the bridge is taken over and made safe, or if the same is closed, then the dedication can be approved. If, however, the bridge is neither taken over nor closed, I am of the opinion that Mr. Riley is not justified in approving the aforesaid plat of dedication, while the bridge remains in its present dangerous condition.

I return herewith Mr. Riley's letter of July 14th, 1911, and the aforesaid plat of dedication.

Respectfully submitted,

J. G. SKINNER,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

OCTOBER 11th, 1911.

MR. HENRY ERICSSON, Commissioner of Buildings.

Dear Sir:

Mr. Sexton has referred to me for reply your communication dated October 4, 1911, hereto attached, wherein you desire advice as to whether owners of buildings used for Class I purposes can be compelled under Section 251 of the Chicago Code of 1911 to have examinations made by an architect or other competent person for the purpose of establishing the strength of floors, which floors are to be placarded after the figures for such placards have been verified by your department.

The cost of securing this information on all buildings of Class I of this city is considerable and the question that you are interested in is as to whether your department can compel the owners to supply the figures for such placards.

Section 251 of the Chicago Code of 1911, provides as follows:

“Display of placard—indicating floor strength.)

(a) It shall be the duty of the owner of every building of Class I now in existence or hereafter erected, or of his agent, or of the occupant, or person in possession, charge or control of same, to affix and display conspicuously on each floor of such building, a placard, stating the uniformly distributed load per square foot of floor surface, which may with safety be applied to that particular floor, as provided by this chapter, or if the strength of different parts of any floor varies, then there shall be such placards for each varying part of such floor. It shall be unlawful to load any such floors or any part thereof to a greater extent than the loads indicated upon such placard.

(b) It shall be the duty of the occupants of such buildings to maintain such placards during their occupation of the premises and of the owners of buildings, or their agents, to cause the same to be properly affixed with each change of occupation. It shall be the duty of architects of all buildings to calculate the figures for such placards, which shall be verified and approved by the commissioner of buildings before they are affixed upon the respective floors of the different buildings. The calculations and loads shall be in accordance with the provisions of this chapter.”

In a large number of cases, Mr. Garraty of your depart-

ment informs us, owners contend when they are prosecuted for failure of their architect to supply calculations, that either the architect cannot be found or that the plans and data for calculating such figures have been destroyed or for other reasons are inaccessible.

If such defenses are true it appears to us that a prosecution must fail for the reason than an ordinance cannot compel any person to do anything which is unreasonable or impossible or oppressive.

Law v. Concord, 70 N. H. 485;
49 Atl. Rep. 687.

To the same effect we have advised you in our communication dated July 25, 1911, with reference to the building of Butler Brothers.

We cannot find anything in this section or in the entire chapter on buildings, under which you can compel an owner of a building of Class I to have an architect or competent person, other than the original architect of such building, supply calculations for the placarding of floors.

This, however, does not relieve the owner of every building from the duty of affixing placards stating the load per square foot of floor space which may with *safety* be applied. Clause A of Section 251 herein quoted makes it "the duty of the owner of every building * * * or of his agent, or of the occupant, or person in possession * * * to *affix* and *display* conspicuously on each floor * * * a placard, stating the uniformly distributed load per square foot of floor space, which may with *safety* be applied to that particular floor."

We would, therefore, advise you that wherever a prosecution against the owner for failure of the architect to supply calculations fails, or in cases where you believe that such a prosecution will fail, either because the original architect or his data are inaccessible, then it would be better for your department to prosecute under Clause A of Section 251. Of course it is true that in such event, if there is any expense connected with the securing of information for the purpose of proving that the placard does not state "the uniformly distributed load per square foot of floor space, which may with

safety be applied to that particular floor," then such expense must be borne by the city and not by the owner.

We further desire to call your attention to Section 201 of The Chicago Code of 1911, under which you may also prosecute.

Section 201 reads as follows:

"INSPECTION OF ALL BUILDINGS IN GENERAL USE—PRECAUTIONS IN BEHALF OF PUBLIC SAFETY—MAY REQUIRE REPAIR OR ALTERATION IN SUCH CASES—INTERPRETATION OF THIS CHAPTER.) (a) The commissioner of buildings shall inspect or cause to be inspected all public school buildings, public halls, churches, theaters, buildings used either for manufacturing or commercial purposes, hotels, apartment houses and other buildings or structures occupied or frequented by large numbers of people, for the purpose of determining the safety of such buildings, or any parts or appliances or equipment thereof; the sufficiency of their doors, * * * and the strength of their floors, and he shall make return of all violations of the several provisions of this chapter to the department of law for prosecution.

(b) It shall be the duty of the commissioner of buildings, when any citizen represents, * * * or that any part of any building in the city is in an unsafe or dangerous condition or in any wise in contravention of this chapter, to make an examination of such place or building, and if such representation is found to be true, said commissioner shall give notice in writing to the owner * * * to make such changes, alterations or repairs as safety or the ordinances of the city may require. Upon failure of parties so notified to comply with said notice, the matter shall be placed in the department of law for prosecution.

(c) It shall be unlawful to continue the use of such building until the changes, alterations or repairs found necessary by the commissioner of buildings to make such building or part thereof safe or to bring it into compliance with this chapter, shall have been made.

(d) The commissioner of buildings shall have full power to pass upon any question arising under the provisions of this chapter, subject to the conditions, modifications and limitations contained therein."

It is to be observed that under this section your powers are very broad. Although under Clause C a building cannot be used until the changes, alterations or repairs found neces-

sary by you to make such building safe or to bring it into compliance with the chapter, shall have been made, at the same time if there is any expense connected with the ascertainment of facts or data upon which any action is taken by you, such expense must be borne by the city and not by the owner.

Respectfully submitted,

MAX M. KORSHAK,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

OCTOBER 12, 1911.

TO THE HONORABLE, THE BOARD OF ELECTION COMMISSIONERS
OF THE CITY OF CHICAGO.

Gentlemen:

October 2, 1911, the City Council passed two ordinances authorizing the issuance of bonds to the amount of \$750,000 for the purpose of paying and discharging judgments, and to the amount of \$4,655,000 for the purpose of constructing bridges. At the same meeting the City Council passed a resolution calling a special election to be held in all the precincts of the City of Chicago on the seventh day of November, 1911, for the purpose of submitting said two ordinances to the voters, and directed the City Clerk to notify your honorable body thereof, etc.

I understand that the City Clerk has complied with said resolution and notified you in writing of the passage of said ordinances and the calling of said special election and has also sent you a certified copy of each ordinance.

I have held several conferences with Hon. Charles H. Mitchell, attorney for your honorable body, and with the legal representative of the leading bond buyers of this city, at which we discussed the possible effect of the act passed by the General Assembly of Illinois at its 1911 Session, amending sections 13 and 14 of the Ballot Act of 1891, on the act approved June 4, 1909, requiring the submission of bond ordinances to the voters on a ballot separate and distinct from the ballot containing the names of the candidates for office.

Our conclusion was that the passage of said Act of 1911 amending Sections 13 and 14 of the Ballot Act of 1891, did not operate to repeal the requirements of said Act of June 4, 1909.

I therefore respectfully request your honorable body to cause said two ordinances and the propositions as prescribed by said Act of June 4, 1909, to be placed on a ballot "separate and distinct from the ballot for candidates for office."

Respectfully,

WM. H. SEXTON,
Corporation Counsel.

OCTOBER 14, 1911.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

We have your request for an opinion as to the liability of the City of Chicago for the claim of J. W. Bell in the sum of Two Hundred Eighty-six Dollars for alleged damage to articles of merchandise by reason of the bursting of a water pipe at Franklin and Van Buren streets.

It appears that on the 13th day of September, 1911, there occurred a leak in the six-inch lead to a fire hydrant located at the northwest corner of Franklin and Van Buren streets and that the same was repaired by one John Barbour, an employe in the Division of Water Pipe Extension.

In a communication herewith attached, signed by the foreman of the first district of the said division of the Water Pipe Extension, it is alleged that two to four inches of water were found in the basement located in the building at the said northwest corner of Van Buren and Franklin streets.

Further investigation by this department shows that the said basement is used as a trunk factory by the said J. W. Bell, and that certain articles of merchandise were damaged.

It further appears that the water main in which the said leak was found was laid in the year 1870. The pipes composing the main seem to have been of excellent quality. We are unable to determine the cause of the said leak.

The owning of water works and the furnishing of water by a municipal corporation to its inhabitants for profit is an undertaking of a purely private nature. The duties ex-

acted of a municipality under such circumstances are the same and the liabilities imposed upon it are the same as those imposed in case of private corporations or individuals who are engaged in a similar enterprise. They are bound to exercise due care and skill in constructing and maintaining mains for the distribution of water, but they are not insurers of the safe condition of property and consequently are not liable for injuries that could not have been prevented by the exercise of due care and vigilance. The negligence in such cases might be said to be the omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or do something which a prudent and reasonable man would not do.

In *Terry v. The Mayor, etc., of New York*, 8th Bosworth 510, the court in referring to a case in point said:

“No one is responsible for injury committed by their breaking unless caused by negligence or design. If all due diligence is used in making or maintaining the pipes, the injury becomes an unavoidable accident for which no one is responsible. There is no evidence that the pipes were originally defective and as they were in long before the damage in this particular matter, they must have been originally strong.”

And the court in the same case further says:

“If the pipes were originally sound there was no proof or want of care in repairing any known defects or discovering them. Neglect is not to be presumed any more than fraud, except in cases where the policy of the law places the burden of discovering it upon the party.” See also:

Bythe v. Birmingham Water Co., 11 Exchequer 781.

In the case of *Selz, Schwab & Co. v. The City of Chicago*, 202 Ill. 549, the court said:

“There were no facts stated from which the law would imply a duty of inspecting the pipes laid deep in the earth below the streets, or any facts showing for what reason an inspection would or could be necessary. Judging from the facts stated in the count, an inspection of mains and pipes under the streets would be impossible and if there were any facts showing the necessity or propriety of such an inspection they should have been alleged.”

A careful examination of the authorities discloses no dissenting opinion from the doctrine announced in the above cases, and as there was no negligence on the part of the city or its employes in the original construction of the main, nor was there any negligence on its part either in its maintenance, in making repairs or otherwise, I am of opinion that the city is not liable.

Yours very truly,

EDWARD T. WADE,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

CHICAGO, OCTOBER, 17, 1911.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Your letter of inquiry concerning authority to revoke licenses of auctioneers was turned over to me with instructions to prepare an opinion regarding same.

In the Chapter of the Chicago Code of 1911 relating to Licenses, general discretionary power is given the Mayor over the granting of licenses. He is also given the power generally to revoke, for cause, any license granted by him. Under this authority it is proper for him to revoke a license whenever good cause is shown unless there is some provision in the ordinance relating to the particular occupation which defines more clearly what punishment shall be meted out to offenders.

The Chapter on Auctions and Auctioneers is most specific in its provisions, and the penalty prescribed for each offense must be held to prevail over the more general provision mentioned above. Not every offense of an auctioneer defined in that chapter is punishable with the extreme penalty of revocation of his license. In some cases the penalty is only a fine. In other cases the ordinance provides for a fine and the revocation of the license, such provision appearing to be mandatory and to follow as a matter of course a judicial sentence. In one case it provides for revocation within the discretion of the Mayor. It should be noted that the line is distinctly

drawn in the paragraph giving this authority, Section 131 of the Code, which provides in the first instance that if an auctioneer refuses to return the purchase price under certain conditions "he shall forfeit his license and be liable to a fine," etc., and then goes on to say that if it appears "to the satisfaction of the Mayor," that the place was closed at any time during the period when such article might lawfully be returned, for the purpose of avoiding an offer to return same, the Mayor shall revoke the license. Thus in the first place it is a matter of judicial determination if he refuses to return the money, but if he closes his place so as to avoid doing it the Mayor may act without judicial determination.

Where an ordinance is so precise in its terms regarding revocation it cannot be said to be within the discretion of the Mayor to revoke, even when satisfied that there has been a violation, unless there was a judicial finding to that effect, except in the one instance where that express discretionary power is given.

All licenses issued by authority of the City contain a clause to the effect that the same may be revoked at the discretion of the Mayor. The mere acceptance of the license does not always bind the licensee to this condition. The clause will undoubtedly hold where the Mayor is expressly given such discretionary power to revoke by ordinance. Our Supreme Court so decided in the case of an auctioneer.

Wiggins v. City of Chicago, 68 Ill. 372.

In view of the language used by the court in some decisions, such a condition would probably also be held good in a case where a city is given practically unlimited power over a business, as in the case of a dramshop, but since such power was expressly given to the Mayor in each instance where the court has so held, I do not regard this as finally settled.

Schwuchow v. City of Chicago, 68 Ill. 444.

Malkan v. City of Chicago, 217 Ill. 477.

Where however, the business is one which the municipality has the authority to tax, license and regulate, but cannot suppress or prohibit, I am convinced that the insertion of such a revoking clause in the license without authority for the same

in the Code does not give the Mayor absolute discretionary power.

With the one exception noted above, therefore, it seems that a judicial determination of the question would be necessary before revocation in the case of Auctioneers' licenses.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

OCTOBER.18, 1911.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

You referred to this office a communication from Mr. H. A. Busby, concerning the distribution of certificates to purchasers by the Washington Shirt Company, entitling the holder to participation in a distribution of presents, in which the writer inquires whether same is lawful.

The certificate in question is numbered and dated, and states on its face that it is one of a number of the same character issued by the Washington Shirt Company to its patrons with each purchase of \$1.00; that two of such patrons who shall be found to hold the requisite certificate will each be presented with a touring car valued at \$1,250.00, and that the numbers of the successful certificates will be announced by posting the same in the windows of the Company's stores at a certain time.

There is no doubt that the issuance of such certificates to purchasers, comes within the definition of a lottery scheme as set forth in the statutes governing same. It is also contrary to Section 985 of the Chicago Code of 1911.

Gift enterprises of this nature have been uniformly held to be lottery schemes, and have been so often the subject of judicial interpretation that it is unnecessary to cite the numerous authorities to that effect.

The only way in which this presentation differs from that ordinarily in vogue is that there is nothing to show that it will

be made as the result of chance. This, however, does not change the character of the enterprise in the least, since the distribution must be the result of chance. Our Supreme Court passed on that point in the case of *Thomas v. People*, 59 Ill. 160, where the whole question is covered in the following language:

“The advertisement contains this language: ‘There will be distributed, as presents, to the purchasers of engravings, in a just and legal manner, \$200,000 in presents.’ The term, ‘present,’ though literally it means a gift, yet, in the relation, and in the sense in which it was used, evidently meant a prize. It was offered as the reward of contest, to the purchasers. It was something to be won.

* * * * *

Here, then, was a scheme for the distribution of prizes. Was the distribution certain and fixed, or was it to be by chance?

It is urged, in defense of this scheme, that no plan of distribution had been determined upon; that the purchasers were to receive certain articles in a just and legal manner, and that a plan might be devised, at the proper time, which would neither violate the law nor be in contravention of good morals.

The distribution was to be in a just and legal manner. It should, then, be in an honest upright and equitable mode. There should be perfect fairness and equality. This plan would be utterly violated, if any one of the numerous purchasers should fail to receive a prize. The distribution could not be in a ‘just and legal manner,’ unless the number of purchasers was the same as the number of prizes, and the prize received proportional, as nearly as possible, to the amount of money paid.”

From the above it is clear that the distribution of these certificates to purchasers is unlawful.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

OCTOBER 18, 1911.

HON. ANTON J. CERMAK, Chairman, Committee on Elections,
City Council.

Dear Sir:

At the last meeting of the city council an order was passed requesting the Corporation Counsel to furnish to the Committee on Elections

“An opinion on the right of the city council to redistrict the city into wards, the extent of such power, and rules to be observed in such redistricting.”

Section 2, Article 3 of the Act of 1872 in relation to the incorporation of cities and villages as amended by the Act of June 4, 1889, provides that in cities of over 350,000 inhabitants

“there shall be elected forty-eight aldermen and no more, unless additional territory shall be annexed to such city; after such city shall have been divided into wards on the basis of forty-eight aldermen, in which case and as often as new territory shall be annexed to such city, as aforesaid, containing three or more square miles of territory or fifteen thousand inhabitants and not exceeding twenty-five thousand inhabitants, such annexed territory shall constitute a ward of such city, and the city council of such city shall authorize the legal voters of such annexed territory to elect two aldermen from such ward in such annexed territory, which said aldermen in such annexed territory shall be additional to said forty-eight aldermen:
* * * Provided, further, that when the number of aldermen in any such city shall reach seventy by reason of such annexed territory, the city council shall redistrict said city into thirty-five new wards and no more; and when said number of aldermen shall reach seventy, if any new territory is thereafter annexed which shall contain twenty-five thousand inhabitants, or more, as determined by the last preceding national, state, school or other census authorized by law to be taken, then said city council shall redistrict said city into thirty-five wards; Provided, further, that whenever after such new territory shall have been annexed, as aforesaid, said city shall be redistricted, the number of wards at the time said city is redistricted shall be preserved and the city council thereof may, in its discretion, change the boundary between such new ward and the original territory of the city, and make said new ward larger or smaller, to comply with the requirements

of said act as to compactness and equality of inhabitants; And, provided, further, if it shall appear from any census heretofore or hereafter taken, that any city has the requisite number of inhabitants to authorize it to increase the number of aldermen, it shall be the duty of the city council thereof to proceed without delay and redistrict such city in accordance with the provisions hereof, * * *

Section 4, Article 4 of said Act as amended by the Act of June 17, 1887, is as follows:

“The city council of any city in this state, whether organized under this act or under any special law of this state, may, from time to time, divide the city into one-half as many wards as the total number of aldermen to which the city is entitled; and one alderman shall, annually, be elected in and for each ward, to hold his office for two years, and until his successor is elected and qualified. In the formation of wards the population of each shall be as nearly equal, and the ward shall be of as compact and contiguous territory as practicable.”

We are aware of no other statutes bearing upon the power of the city council to redistrict the city.

Since the last ordinance redistricting the city into thirty-five wards was passed by the city council there has been no annexation of territory sufficiently large to require the redistricting of the city as provided by Section 2 of Article 3, Chapter 24, above quoted, which section makes it mandatory on the city council to redistrict in such circumstances. This being so, it has been said that the city council has no power to redistrict the City of Chicago notwithstanding the provisions of Section 4, Article 4, above quoted.

The precise question thus presented has, however, been adjudicated by our Supreme Court in the case of *People ex rel. Stansbury v. The Mayor and City Council of the City of Danville*, 147 Ill. p. 127. In that case the City of Danville had, prior to the institution of the litigation, been divided into seven wards. Later the city council redistricted the city, the number of new wards remaining the same. The relator objected to the new redistricting for the reason that no annexation had taken place before the passage of the ordinance. The court carefully reviews the effect of Section 2 of Article 3 and

Section 4 of Article 4 of the Cities and Villages Act, and (referring to the latter section) says at page 135:

“That section would seem to vest in city councils a discretion to redistrict their cities into an appropriate number of wards, whenever in their opinion there is suitable occasion for so doing. They are authorized, not once for all, but from ‘time to time,’ to divide their cities into the number of wards to which they are entitled. This interpretation of the language used is so obvious that it must prevail, unless some cogent reason to the contrary is shown.

* * * * *

We would not be understood as holding that city councils may at any time change the boundaries of wards capriciously or without sufficient reason, but when such council sees fit to exercise its legislative discretion in that behalf, it will be presumed, at least in the absence of clear proof to the contrary, that it acts upon some sufficient reason or necessity.”

I am of the opinion that the city council has the power to redistrict the city whenever it sees fit so to do, provided it bases its action upon some sufficient reason or necessity. The results of the last census show clearly that this necessity exists and that it is the plain duty of the city council to redistrict the city.

The only rule to be observed in such redistricting is to comply with the portion of said Section 4 of Article 4, above quoted, which reads:

“* * * In the formation of wards the population of each shall be as nearly equal, and the ward shall be of as compact and contiguous territory as practicable.”

Respectfully,

WM. H. SEXTON,
Corporation Counsel.

OCTOBER 19, 1911.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Your letter of July 6, 1911 addressed to the Corporation Counsel, in which you inquire whether the street car and elevated railroad companies have a right to carry advertising

matter in their cars, has been referred to me for an opinion. I have the honor to reply, as follows:

The real purpose of this inquiry, I take it, is to determine whether the City has a right to receive any of the revenue derived from the advertising business of the elevated railroad companies. The surface street car lines by and through the traction ordinances of February 11, 1907 are now paying into the City Treasury 55 per cent. of the net earnings of the advertising business now carried on in the surface street cars, but the elevated railroads do not remit any part of the revenue derived from said advertising business to the City.

The Chicago and Oak Park Elevated Railroad and the South Side Elevated Railroad have a license that extends almost entirely over the streets and alleys of the City of Chicago and the other elevated railroad companies all use the streets, necessarily, in crossing the same. Consequently all the elevated companies are using the public streets and alleys of Chicago to carry on said advertising business.

All of the ordinances of all of the elevated railroads contain a section in substantially the following language:

“The rights and privileges hereby conferred are upon the further expressed condition that said elevated railroad shall be **EXCLUSIVELY** used for the transportation of *passengers and mail.*”

This provision of the ordinance was accepted by the several elevated railroad companies and therefore becomes binding upon them.

This then excludes any use of said streets by said railroads, unless by implication, for any other purposes except the carrying of passengers and mail.

A power which the law will regard as existing by implication must be in a sense necessary to carry on the business for which it was created.

People v. Pullman, 175 Ill. 137.

In this case the court says at page 138:

“Implied power exists only to enable a corporation to carry out the express powers granted, that is, to accomplish the purpose of its existence, and can in no case avail to enlarge the expressed powers and thereby warrant it to devote its efforts and capital to other purposes

than such as its charter (in this case its ordinance) expressly authorizes, or to engage in collateral enterprises not directly, but only remotely connected with its specific purposes."

The carrying on of the extensive advertising in said cars by which the railway companies necessarily use the public thoroughfare of said City is in no part necessary for the carrying of passengers or mail and is therefore a violation of their ordinances.

Fifth Avenue Coach Co. v. N. Y., 194 N. Y. 31;
Pittsburgh & Birmingham Traction Company v. Seidell, 6 Pa. District Report 414.

In this last case the street car company sued the defendant, Seidell, for a breach of contract, which was his failure to pay for the advertising display of INSIDE and outside of the company's cars, the company having given the defendant an exclusive right to said advertising space.

The defendant undertook to avoid his liability by setting up the want of authority and power of said company to carry on the said advertising business along with its duty to carry passengers for hire.

On page 415, the court says:

"The plaintiff has not only the right to carry passengers, but it also has a right to do anything necessary for the convenient carrying out of the purposes for which it was chartered and whatever is fairly incidental thereto.

* * * * *

We are unable to see how the business of advertising for pay comes within any of the rules given as to powers of such corporation. It is not necessary for carrying out any of the powers or purposes for which these corporations were chartered, nor is it incidental thereto. It is not conducive to the comfort or safety of the passengers, or to their convenience, any more than would be the printing of a newspaper or establishing a banking business.

It is urged that the occupying of the space inside or outside with advertising does not inconvenience the passengers nor injure the public. Perhaps not, even though it be a disregard of the good taste of the passengers or the public."

The city has the authority under its police powers to prohibit such advertisements.

Fifth Avenue Coach Co. v. N. Y., 194 N. Y. 28.

In this case on page 28, the court says:

“A city which owns the fee of its streets can refrain from granting rights therein that are not for street purposes.”

The city is the owner in fee for the use of the public of all the statutory dedicated streets and alleys, and some, at least of the streets and alleys used by the elevated railroads are dedicated in this manner and for street purposes. All are held by the city for the use of the public and the city may under the power of exclusive control of the streets, allow any use of them not inconsistent with the public objects for which they are held and it is equally well settled in this state and in the State of New York that the city may regulate such use and fix a reasonable compensation to be paid by the same.

Chapter 24, Section 1, Article V, Clauses 7 and 9, Hurd's Statutes;

Sears v. City of Chicago, 247 Ill. 216;

Fifth Avenue Coach Co. v. N. Y. City, 194 N. Y. Appeals, 28.

In the last case the court says:

“That the defendant, New York City, owns in fee the streets and avenues over which the plaintiff runs its stages, is not disputed. Such streets are held in trust for the public. In *Osborn v. Auburn Telephone Company*, (189 N. Y. 397) this court says: ‘Cities which own the fee in the streets may contract, lease or grant their use for public or municipal purposes, not inconsistent with nor prejudicial to the public easement of the use for street purposes. In such cases the fee having been transferred to the municipality, it can grant rights in the streets other than for street purposes which do not impair the public easement.’ ”

The following is the ordinance in controversy in that case:

“No advertising trucks, vans or wagons shall be allowed in the streets of the Borough of Manhattan under penalty of \$10.00 for each offense. Nothing herein contained shall prevent the putting of business notices upon ordinary business wagons, so long as such wagons are engaged in the usual business or work of the owner and not merely or mainly for advertising purposes.”

The New York Court of Appeals in this case held the de-

fendant's motor coaches, which were run primarily for carrying passengers for hire, were operated in violation of this ordinance because the coaches were covered with advertisements on the outside as an advertising business.

Another recent decision by the Supreme Court of Virginia in the case of *National Car Advertising Company v. Louisville & Nashville Railroad Company*, 110 Va. 413, holds that a railroad company has no implied power to grant the exclusive right to use its box cars for advertising purposes.

The court at page 415, says:

"That the Louisville & Nashville Railroad Company was chartered by the legislature of Kentucky in 1850, the general purpose of its creation was the transportation of persons, merchandise and property. We have searched so much of the charter as appears in the record, in vain, for any provision which would sanction the contract under consideration. We cannot conceive to what power it is incidental or in what respect it would promote the execution of the powers expressly granted or be beneficial in any degree to the general public. It is not within the express powers, nor fairly to be implied from any provisions of the charter as exhibited in this record."

The Fifth Avenue Coach case, *supra*, was affirmed by the Supreme Court of the United States in an opinion by Justice McKENNA, Vol. 221, (Advance Sheets), who said:

"That said ordinance of New York City prohibiting the signs and advertisements on the outside of plaintiff's coaches came properly within the police power of said city to enact such an ordinance."

It naturally follows then if the City has the power to enact such an ordinance that will prohibit the signs and advertisements on the outside of the coaches, it will have the power to do likewise inside the street cars as held in the Seidell case, *supra*.

The Supreme Court of the United States in the foregoing case also decided:

"First, That the plaintiff's property right to carry such advertisements exceeded its charter right;

Second, That the said ordinance did not, by denying the plaintiff the right to carry advertisements on the outside of its coaches, deprive the plaintiff of its property without due process of law in contravention of the Four-

teenth Amendment of the Constitution of the United States;

Third, Denied that said ordinance deprived the plaintiff of equal protection of the laws;

Fourth, Denied that the said ordinance impaired the obligation of the contract between the plaintiff and the Railway Advertising Company and that between the State of New York and the plaintiff."

The question of the right of street railways or common carriers to contract for the use of their cars for advertising purposes has not often been raised in this country. The author of the Lawyers' Reports Annotated, page 1010, Vol. 24, in a note says:

"Although aside from the *National Car Advertising Company v. Louisville & Nashville Railway Company*, but little authority has been found on the question under discussion; the cases that have been found, in the main, seem to agree with the above case in holding that the leasing of space in cars or coaches for advertising purposes is not a necessary incident to the express or implied powers commonly granted common carriers for the purpose for which these corporations are chartered and that, therefore, the acts of a common carrier in entering into a contract for the leasing of advertising space on its cars or coaches is an *ultra vires* act."

This comment was made by the author as late as November 18, 1909. The authorities on this question whether the city can license the streets for advertising purposes when the easement is not interfered with, are not numerous.

In our own state the question of the use of the streets for advertising purposes came up in the case of the *People ex rel. v. Clean Street Company*, 225 Ill. 470, which advertising business was carried on by means of metal boxes being placed upon the corner of sidewalks at the street intersections for the alleged purpose of serving the public use by collecting waste paper, etc., to keep the streets clean, but this case is not in point.

The court found in this case that the said boxes did not serve a public purpose and that the placing of said boxes on the sidewalk aforesaid was an obstruction and were there primarily to promote a private enterprise and the public use was only incidental. It further held that the city had no au-

thority to delegate its street cleaning powers to a private individual or corporation.

This case does not hold that the city has no right to license the use of the streets for a private business, if the said business does not interfere with the public use of the streets, but on the other hand quotes with approval the case of the State v. City of St. Louis, 161 Mo. 371, where the court says:

“But it is said that it is no objection to a public franchise that its owner may derive a private gain therefrom. This is unquestionably true when the use is public and the gain arises out of that use such as street cars, telegraph and telephone lines.”

The legislature of this state has delegated to the City of Chicago the power to regulate the use of streets for all purposes. It is well settled that the city has no power or authority to license the use of the streets for a private business that from the very nature of things will interfere with the public easement. Even when an abutting property owner has not parted with his title to the street, but has only conveyed an easement to the right to the use of the street, he retains title to the center of the street and can use the same under the surface if such use does not interfere with the object for which it was dedicated and the converse of this is true, so far as the city is concerned and wherever it owns title to the center of the street, it can charge rental for the use of the street under the surface thereof. This doctrine is made emphatic in:

Sears v. City of Chicago, 247 Ill. 216;

Tacoma Safety Deposit Co. v. City of Chicago, 247 Ill. 192;

Geo. J. Williams v. City of Chicago, 247 Ill. 240;

Edwin B. Sheldon v. City of Chicago, 247 Ill. 267;

Martin A. Ryerson v. City of Chicago, 247 Ill. 185.

In the *Sears* case, *supra*, page 216, the court says:

“Whatever may be the rule in other jurisdictions, the law is settled in this state that a city may, under the powers of exclusive control of its streets, allow any use of them which is not inconsistent with the public objects for which they are held (citing numerous authorities) and it is equally well settled that the city may regulate such use and fix a reasonable compensation to be paid for

the same. (*McCarthy v. City of Chicago*, 53 Ill. page 38; *City of Chicago v. Norton Milling Company*, 196 Ill. 580; *Lobdell v. City of Chicago*, 227 Ill. 218.) The power of the municipality in this regard in cases where it owns the fee in its streets is subject to no limitation, except that its exercise shall be reasonable and in a manner to safeguard the paramount right of the public to the free and unobstructed use of the streets for the purpose for which it was dedicated."

In the case of the Tacoma Safety Deposit Company, *supra*, on page 200 the court says:

"* * * The right of the city to control its streets cannot be doubted, so long as it uses its streets for purposes for which they have been dedicated. * * * In a case where the fee is in the city it would not be an unlawful diversion of the use of a street to permit a vault or other similar underground structure to be erected beneath the street, which structure did not interfere with the purposes for which the street was dedicated, and the city would not be estopped from requiring space occupied by such structure to be surrendered to the city whenever it became necessary to remove the structure for the uses of the public. (*Gregsten v. City of Chicago*, 145 Ill. 451; *City of Chicago v. Norton Milling Co.*, 195 Ill. 580.) * * *

* In the *Gregsten* case and in the *Norton Milling Company* case, the right of the City of Chicago to confer, by contract, upon a private individual or corporation the right to the space beneath the public streets of the city, was recognized. If the city has the power to contract for the use of space beneath the public streets of the city, we see no reason why it cannot provide for such use and regulate the manner of such use, and the compensation that shall be paid for such use, by ordinance, in those streets in which it holds the fee, subject at all times to the right to reclaim the portion of the street then in use when the necessities of the public may require. * * *"

Reasoning then from analogy there can be but one logical conclusion. If the city in exercising its property rights to the streets can go into the real estate and renting business beneath the surface of the streets, if such business does not in any way interfere with the public use of the streets, there can be no question but that it can go into the advertising business to be carried on inside of the cars using the streets because this business can in no way interfere with the public easement of the

street. The business is run collateral to and in connection with the carrying of passengers for hire, which is the primary object; and the use of the streets for street cars, elevated trains, etc., is a lawful servitude of the streets. In fact the advertising business carried on inside of the cars cannot effect or interfere with the public use of the streets as readily as the use of the streets under the surface could interfere with the public business pertaining to the public use of the streets. We can readily see how such use could interfere with water mains, and gas mains and such public use of the streets, while the advertising business inside the cars could not in any manner interfere with any conceivable public use of the street, and would not in any manner whatever subvert the objects for which the streets were dedicated.

Then if the city has the power to regulate such use of its streets as advertising business inside of the street cars it has the authority to license said business for a revenue.

Cooley on Taxation, (Volume 2, 3rd Ed., page 1137) defining a license, says:

“A license is a privilege granted by the state usually on payment of a valuable consideration, though it is not essential. To constitute a privilege the grant must confer authority to do something, which without the grant would be illegal; for if what is to be done under the license is open to everyone without it, the grant would be merely idle and nugatory, conferring no privilege whatever. But this thing to be done may be something lawful in itself, and only prohibitive for the purpose of license; that is to say, prohibited in order to compel the taking out of a license. This is always the case where that which is licensed is not unlawful at common law.”

And the city in exacting a license fee as revenue for itself, does so for the whole state.

In *People v. Suburban Railroad Company*, 178 Ill. page 605, the court says:

“The General Assembly, representing the people at large, possesses full and paramount power over all highways, streets, alleys and like public places in the state.

* * * * *

The state does not, however, exercise directly that full, paramount power which it possesses over streets,

alleys, etc., but in the distribution of governmental powers the General Assembly adopted the policy of selecting the cities and villages of the state as governmental agencies and delegating to such municipalities the power to regulate and control the use of the streets, alleys, etc., within their respective limits. Such power thus delegated is exercised by the municipal authorities acting in behalf of the state for the benefit of the public."

For this reason the city council may, in the name of the state, impose certain conditions upon the person or corporation receiving the beneficial use of the streets which it may deem for the best interests of the public, and in doing so may charge a compensation therefore as in its discretion it sees fit.

In conclusion I am of the opinion that the carrying of advertisements inside the elevated cars in the City of Chicago, without permission from the city, is unlawful and without authority.

I am also of the opinion that the city council acting under and through its police powers has a right to enact an ordinance prohibiting such advertisements in said cars.

And I am of the further opinion that the city council has a right to pass an ordinance requiring compensation for the privilege of permitting such advertising business to be carried on in their said cars while using public thoroughfares of the City of Chicago.

Respectfully submitted,

(Signed) A. L. GETTYS,
Assistant Corporation Counsel.

Approved:

(Signed.) WM. H. SEXTON,
Corporation Counsel.

OCTOBER 23, 1911.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

The above application which accompanies the communication of Ricard O'S. Burke, Assistant Engineer, Harbor Division, of the 19th inst., should be denied for the reason that its tendency would be to complicate the harbor situation by acknowledging through a permit what the company,

in its application, claims to be "accretions that have washed into *our* dredged channels leading from Lake Calumet to *our* ice elevators on *our* property located on the west shore of Calumet Lake.

The facts are briefly the following:

1. Many years ago a controversy of this nature arose with reference to Wolf Lake in which it was claimed by riparian owners that their property extended to the center of the Lake, as in the case of riparian owners upon the banks of navigable rivers. They succeeded in having a second survey made in which their claims were upheld by the General Land Office.

2. The case of *Fuller v. Shedd*, 161 Ill., p. 462, disposes of this contention in such plain words, that the language of the application, above quoted, sounds like mockery. *The owner's land in a case like the present, extends to the water's edge only.*

3. That being the case, I find from the sketch annexed that the Knickerbocker Ice Company occupies a large area of land within the meander line, title to which land is held by the State in trust for all the people, who alike have benefit thereof in fishing, boating, and the like.

4. I further find that "the icehouse, railroad tracks, roadways and auxiliary buildings of this company are located within the meander line". (Report of Submerged and Shore Lands Legislative Investigating Committee, Vol. II, pp. 38-39.)

5. The City of Chicago by its survey of Lake Calumet in 1910 has confirmed all the facts herein given.

Very truly yours,

NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

OCTOBER 24, 1911.

HON. CHARLES M. THOMSON, Alderman, 25th Ward.

Dear Sir:

We have your favor of the 23rd inst. asking whether it is within the power of the city council under the traction ordinance to prevent the Chicago Railways Company from permitting the Cook County Traction Company to run its (the Cook County Traction Company's) cars into the City of Chicago and over the lines of the Chicago Railways Company to a barn belonging to the Chicago Railways Company located inside of the city limits for the purpose of storing said cars.

The Chicago Consolidated Traction Company several years ago went into a receiver's hands, and at the sale of the properties of this company the portions within the city limits were purchased by the Chicago Railways Company, and the portions beyond the city limits were purchased by one Cook. Those portions purchased by Cook were thereafter organized and incorporated under the name of the Cook County Traction Company.

Section 40 of the ordinance authorizing the Chicago Railways Company to construct, maintain and operate a system of street railways in the streets and public ways of the City of Chicago, passed by the city council February 11, 1907, provides:

"No lease or operating agreement and no assignment, except by way of mortgage or trust deed, under the provisions and limitations of this ordinance shall be made by the company without the consent of the city council of said city."

Under this clause no operating agreement permitting the use of the Railways Company's tracks by the County Traction Company for the purpose of hauling its cars and storing the same in the barns of the Chicago Railways Company can be authorized except by consent of the council. I find, moreover, that Section 24 in dealing with relations between the Chicago Railways Company and the Chicago Consolidated Traction Company, of which latter company the Cook County Traction Company is the successor, as to the part

of its lines outside the city limits, provides in part as follows:

“The company (Chicago Railways Company) may, in its discretion, permit the Chicago Consolidated Traction Company, its successors and assigns, to make such use of the lines of railway hereby authorized as the so-called operating agreement, dated December 1, 1899, between the Chicago Union Traction Company, of the first part, and the Chicago Consolidated Traction Company, of the second part, as modified by agreement between the same parties dated June 9, 1900 (certified copies of both of which agreements have been filed with the comptroller of said city), purports to permit and authorize; provided, as one of the considerations for the passage of this ordinance the company agrees that it will at any time during the life of this grant within six months after being required to do so by ordinance of the said city, procure cancellation and termination of any or all of the agreements which affect in any manner the right of operation or maintenance of any of the lines of street railway the right to maintain and operate which is granted by this ordinance to the company, and to which said agreements the Chicago Consolidated Traction Company or any of the corporations, from or through which the said Chicago Consolidated Traction Company has derived any of its property or rights within the corporate limits of the City of Chicago, is a party.”

I insert and call your attention to this provision in case that it may be claimed by the Chicago Railways Company that it is allowing the use of its tracks in the manner aforesaid by the Cook County Traction Company, successor of the Chicago Consolidated Traction Company, as to lines outside of the city limits under the operating agreement of June 9, 1900. Should the terms of said operating agreement purport to give any right to haul the cars of the aforesaid company over the tracks of the Chicago Railways Company, such provision would be plainly in conflict with Section 40 of the ordinance hereinabove quoted, and can be terminated within six months by the provisions of the section itself.

Moreover, Section 5 of an ordinance passed October 10, 1910, to the Chicago Railways Company, known as the consolidated ordinance, provides that,

“The passage of this ordinance is based upon the as-

sumption that the Chicago Railways Company, within four months from and after the date of the passage hereof, shall be able to acquire the property of the said Consolidated System (except the parts thereof described in said "Exhibit 2") by a good and sufficient title, free and clear of all liens and claims of every description including the release, waiver or extinguishment of all and every one of the rights and claims of every kind and nature in respect to the location, maintenance or operation of street railways in the streets or public ways or parts thereof of said city set forth in said "Exhibit 1" (except the rights and franchises described in "Exhibit 2") now or hereafter vested or claimed to be vested in or to belong to the Chicago Consolidated Traction Company * * *."

This section, in my opinion, would abrogate any operating agreement which the Chicago Railways Company or its predecessor, the Union Traction Company, might have had with the Consolidated Traction Company.

In conclusion I am of the opinion that the running of the Cook County Traction Company's cars over the lines of the Chicago Railways Company within the city limits to a barn belonging to the latter railway company inside of the city limits is not permitted by any ordinance provision.

Yours respectfully,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

OCTOBER 25, 1911.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Replying to your request for a statement as to whether furloughs granted policemen are included in the twenty year service period by the Police Pension Trustees, I beg to say that Mr. Rugg, clerk of the Board, informs me that such furloughs are included within the twenty year period. The information which the Pension Board receives as to the length of time an officer has served is conveyed to it by means

of a certificate from the Secretary of the Police Department stating the entire length of time the policeman has served upon the Police Department, without any reference to what portion of such total period has been used in furloughs or what furloughs, if any, have been taken by the officer. This certificate is accepted by the Pension Board as conclusive of the service of the officer as it is impractical for the Police Pension Board to go into the records of the Police Department and determine how many furloughs each applicant for a pension has received, or the reason for which the same have been given.

The scope of the authority of the Pension Board in this matter is to be found in Section 1 of Rule 10 of the Civil Service rules which reads as follows:

“LEAVE OF ABSENCE. Leave of absence may be granted by the head of a department for a period not exceeding ninety days, and shall be reported immediately to the Commission. Upon approval by the Commission, leave may be granted for a period not exceeding one year. No leave of absence shall be granted within ninety days after appointment or reinstatement except with the consent of the commission. Leave of absence shall not be extended unless application therefor be made prior to the expiration thereof, and any such leave, extension or continuation, whether continuous or not, shall not exceed one year. Upon the expiration of a leave of absence an absentee may be reinstated in his former position; provided, however, if such absence exceeds thirty days, or, in the case of sickness ninety days, and the position in the meantime has been filled, he can be reinstated only when a vacancy exists, and in the order of his seniority. Where leave of absence is requested to enable an employe to take any position in the service of the city not included in the classified service, the same may be granted for periods of one year and during the actual service of said employe in such position.

Leaves of absence on account of illness may be granted for periods of more than one year to members of the police and fire departments, upon the recommendation of the head of the department and the approval of the pension board of the department concerned.”

It will be seen under this section that leaves of absence for under a year do not need the approval of the Pension

Board, and, moreover, I am informed by the clerk of the Board that leaves of absence for more than a year are never submitted to the Board for its approval in conformity with this rule.

Section 1945 of the Code provides in effect that any member of the department becoming injured in the discharge of his duty so as to prevent him from attending to the same may be relieved from duty for a period not exceeding twelve months with pay.

The Pension Board, of course, has no authority from the Police Department and can merely accept the certificate of the proper official of the Police Department as to the time a policeman has served.

The point you make in your communication as to the unfairness of a policeman filling out his twenty year service period by continued leaves of absence on furlough is obvious. This abuse may be corrected by the passage of a Civil Service rule or general ordinance that all furloughs of over thirty days be referred by the Police Department to the Pension Board and approved of by said Board before becoming effective.

I will see that a copy of your communication is placed before the Pension Board at its next meeting and the Board will doubtless request the General Superintendent of Police to furnish it with the names of all policemen on a furlough for more than one year, as such furloughs have been granted without its approval.

In the instances you mention where the furloughs granted to policemen have been improperly extended and the officers receiving such have actually engaged in other business, if the names of these persons can be obtained from the Police Department by the clerk of the Pension Board, proper action will be taken by such board to disregard the period of these furloughs from the computation of the officers' total time of service when application for pension is made. Furloughs for all periods are now being included in the total computation of the officers' twenty year service by the Pension Board, and the only way in which the Pension Board at present can lend its aid to a suppression of the practice to which you refer is by having the Pension Board insist that

the Civil Service rule above referred to be enforced in regard to leaves of absence for over one year, and that in regard to leaves of absence for under a year a Civil Service rule or general ordinance be adopted requiring the Pension Board to approve all furloughs. In such case the Board will be able to keep track of the officers on furlough either by requiring a monthly report or by adopting such rules as will prevent the officers abusing the privileges granted by the furlough.

Yours very respectfully,
 JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

CHICAGO, OCTOBER 25, 1911.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Your attention was directed recently to the claim being made by certain persons interested in the refinancing of the Illinois Tunnel Company that the city would have no right to claim branch tunnels or connections with abutting property at the expiration of the grant, and that the city's rights were confined to the main tunnels alone.

You requested this department to investigate this matter, and in response thereto, we respectfully submit the following:

There were five ordinances passed granting rights, and defining, limiting and extending same, to the Illinois Telephone and Telegraph Company and its assignee, the Illinois Tunnel Co.

The first ordinance was passed on February 20, 1899 (C. P. 1692 to 1696 incl.). This granted the right to construct and operate conduits, wires or other electrical conductors to be used "for the transmission of sounds, signals and intelligence, by means of electricity or otherwise," for a period of 30 years.

Section 8 of this ordinance provides that at the expira-

tion of the license, February 19, 1929, the City shall have the right to purchase "the poles, line or lines of conduits or wires and other instruments, appliances, plant and all property" within the city, of the licensee at a price to be agreed upon. If the price cannot be agreed upon it is to be fixed by appraisal. The city must give three years' notice in writing, before the expiration of the grant, of its intention to purchase. Payment to be in cash, within 60 days from the expiration of the license period and before taking possession. These provisions for purchase are abrogated by the second ordinance.

The second ordinance was passed on July 15, 1903 (C. P. 914 to 921 incl.). This granted the right to construct and operate for the term of the first ordinance "not only wires and electrical conductors * * * but also any appliance or apparatus for the transmission and transportation of newspapers, mail matter, packages, parcels or merchandise."

Under Section 1 of this ordinance it is provided that at the expiration of the grant, February 19, 1929, "all tunnels and conduits heretofore constructed and all tunnels hereafter constructed under said ordinances shall without the payment of any (*further*) consideration (*in addition to that contained in the grant herein made*) become and be the absolute property of the City of Chicago, free from liens and incumbrances." (The italicized words in parenthesis were added by the amending ordinance of July 20, 1903.) The grantee agrees to promptly vacate such conduits and subways unless specific authority is given to continue in possession by the City Council.

Under Section 3 of this ordinance the grantee is given the further privilege, wherever its business requires it, to connect its tunnels with the abutting lots of private owners and with its branch offices and delivery stations "by proper passageways or connecting tunnels," and the method of obtaining permits for "such connecting tunnels" is set forth.

The language of Section 1 is clearly broad enough to include all branch tunnels connecting with private property as a part of the property which the city will own at the expiration of the grant. But, aside from the plain meaning of

the provision, there are other provisions of this ordinance which indicate the intention of the city council to include such branches.

There is a provision in Section 6 for terminating the grant of all privileges except the telephone privilege, by purchase, at the expiration of 20 years from the date of passage of this—second—ordinance, upon twelve months' notice. The property to be purchased is described as "the tunnels themselves, and all appurtenances, equipment and fixtures except the wires, equipment and fixtures necessary to the carrying on of the telephone business."

Again, there is another paragraph in Section 6, which provides for the purchase by the city of "wires, equipment and fixtures necessary to the carrying on of any of the business of said company" upon the giving of notice two years before the date of expiration of the first ordinance, February 19, 1929.

This contemplates the purchase of the telephone plant, as well as all the other property. In specifying the manner in which such purchase shall be made and the granting of rights for the future to this or other grantees the section repeatedly speaks of "said tunnels" and "such tunnels," as distinguished from the other property, and finally speaks of the tangible property "exclusive of the tunnels and conduits, which will then be the property of the City."

At no place in the ordinance does it appear that the connecting tunnels are distinguished from the general terms "tunnels" or "conduits" except where the right to construct them is given in Section 3.

The third ordinance was passed on July 20, 1903 (C. P. 928 to 929). It is simply amendatory of the ordinance of July 15, 1903, and grants no new privileges.

The fourth ordinance was passed on February 1, 1909 (C. P. 2602 to 2605 incl.). This ordinance extends the time within which the grantee must install 20,000 telephones, provides for examination of books by the city and annual reports to the comptroller.

There are additional forfeiture conditions in this ordinance, but nothing enlarging or limiting the city's rights at the end of the term if all conditions are complied with.

The fifth ordinance was passed on June 28, 1909 (C. P. 911 to 914 incl.). By its terms the time for installation of 20,000 telephones is further extended. The other provisions in same do not alter the grant so far as city ownership is concerned.

From the above it will appear that the rights of the city as to ownership at the expiration of the grant, February 19, 1929, are fixed by the terms of the second ordinance, which grants additional rights and was accepted as amendatory of the first ordinance.

It is quite clear from the entire ordinance that the city will become the owner of all tunnels including connecting tunnels, at the termination of the grant.

There are many provisions as to forfeiture in the various ordinances, which I have not discussed, since I understand your inquiry to relate only to city ownership in case there is no forfeiture.

Respectfully submitted,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

OCTOBER 26, 1911.

HON. HENRY ERICSSON, Commissioner of Buildings.

Dear Sir:

Your communication dated October 11, hereto attached, submitting additional information concerning the proposed structure on Evanston avenue has been referred to me for a reply.

On September 29, 1911, we wrote you an opinion answering the verbal request of Mr. Robert Knight, relative to the proposed structure on Evanston avenue indicated at that time by an annexed plat. Your question was whether this structure would be classified as a "Garage" under Section 2683, which provides as follows:

"GARAGE DEFINED.) The word "garage" as used in this article shall be held to mean, and is hereby defined

as meaning, any barn, stable, building or other place within the city where automobiles, autocars or any similar self-propelled vehicles are *kept* or let for hire or reward to any person, whether such vehicle be so hired out or let with or without an operator for same, or where such vehicles are kept ready for use and where rent is paid to the keeper thereof for such keeping."

In your last communication you state that Mr. George Beaumont, Architect for the owner, has submitted to you some additional information and you desire to know whether this additional information will alter our opinion.

Mr. Joseph H. Chapek, one of the residents of the neighborhood where the proposed structure is to be erected, has called on me and informed me that the owner kept a man upon the premises whose duty it was to take care of all of these automobiles. Mr. Chapek's information was to the effect that this individual kept all of the machines in proper working condition. I did not incorporate these facts in my opinion but understand that some services of some kind were performed similar to those incident to the usual garage, and advised you that the mere dividing a building into stalls would not exempt a building from the operation of Article VIII pertaining to "Garages."

Mr. Beaumont points out that not only is the building divided into stalls, each rented to an individual who has his own key and is the only person who has access to the stall containing his machine, but also that there is no "keeper" to the Garage and that no service whatever is given to the owner on his machine, and that in each particular case, the owner of the machine takes care of his machine himself. There is therefore a conflict of opinion as to the facts in this case and we would advise you to investigate for the purpose of ascertaining who is correct.

If upon investigation you find that Mr. Beaumont is correct in his statement of facts then we would advise you that the proposed structure would not come under the definition of a "Garage."

The last clause of Section 2683, to-wit: "Or where such vehicles are kept ready for use," seems to indicate that service must be performed by the keeper in addition to the keeping.

It is true that the section does not state by whom such vehicles are "*kept ready for use*", yet it would seem to us that the intention is that "Garages" should include *only* such places where vehicles are "*kept ready for use*" by the keeper of such garage.

Any other construction which constitutes a building where automobiles are "*kept*" and "*kept ready for use*" by the owner, as a "Garage", would include private buildings owned by an individual containing more than one automobile where the services in keeping such automobiles in use are performed by the owner or his employees.

In addition to this, we desire to call your attention to the proposition of law that all ordinances are construed most liberally in favor of the individual, and strictly construed against a municipality.

In view of the above, if you are satisfied that the information given by Mr. Beaumont is correct, then the proposed structure would not come under the classification of "Garages."

Respectfully submitted,

MAX. KORSHAK,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

OCTOBER 26, 1911.

HON. LAWRENCE E. MCGANN, Commissioner of Public Works.

Dear Sir:

Your letter of August 30th asking for advice as to the City's rights in the premises in front of the property occupied by Rothschild and Company on State street, north of Van Buren street, in regard to the issuance of a permit for the use of space under the sidewalk, has been referred to me.

The East 27 feet of State street in front of the premises in question, was obtained by the City by condemnation, for the purpose of widening the street as previously existing. The ordinance was passed September 8, 1873, and judgment entered thereon, February 1, 1875, which was affirmed on January 25, 1879. The proceedings were recorded on July 5, 1887, as document 847447.

The question to be considered is whether or not this condemnation gave the City the fee to this part of the street, or whether it gave merely an easement to the City to use same as a street. If the City has the fee for a street, it can charge for the use of sub-sidewalk space in accordance with Section 2302 of The Chicago Code of 1911.

If the City owns merely an easement in the street in front of the premises in question, then it cannot charge compensation for the use of sub-sidewalk space there. This general principle has been decided by the Supreme Court in a series of eight cases, the opinions in all of which were filed on October 28, 1910, and rehearings denied on December 9, 1910.

Ryerson v. City of Chicago, 247 Ill. 185;

Tacoma Safety Dep. Co. v. City of Chicago, 247 Ill. 192;

Sears v. City of Chicago, 247 Ill. 204;

Farwell v. City of Chicago, 247 Ill. 235;

Northwestern Safety Dep. Co. v. City of Chicago, 247 Ill. 238;

Williams v. City of Chicago, 247 Ill. 240;

Illinois Trust & Savings Bank v. City of Chicago, 247 Ill. 264;

Sheldon v. City of Chicago, 247 Ill. 267.

In the Tacoma Safety Deposit Company case, *supra*, a question as to the fee to 25 feet on Madison street which had been obtained by condemnation, was raised. In this regard, the court on page 197 makes the following statement:

“This property was condemned in 1851. and at that time there was no statute in force in this State expressly authorizing a city to take the fee of real estate for street purposes, and we think the law is clear that before the city could acquire the fee to said real estate for street purposes it must appear there was a statute in force which, by its terms or by necessary implication, authorized the city to take said property in fee, for the purpose of widening said street.”

From this it appears that the law is that where there is a statute in force expressly authorizing a city to take the fee to real estate for street purposes, the City obtains that fee when it acquires a street by condemnation. By “An Act to reduce the Charter of the City of Chicago and the several

Acts amendatory thereof into one Act, and to revise the same," approved February 23, 1863, known as the Charter of 1863, a method was provided for the condemnation of land for the opening of streets. This method is provided by Section 15, Chapter 7 of that Act and the Section concluded:

"In all cases the title to land taken and condemned in the manner aforesaid shall be vested absolutely in the city, in fee simple."

There is no other provision in any of the Charters of the City of Chicago, or in the Cities and Villages Act, prescribing or indicating the estate or title taken by the City by condemnation in its streets. There can be now no doubt, therefore, that if this provision of the Charter of 1863, is still in force, the fee to all real estate condemned since February 23, 1863, by the City for street purposes is in the City of Chicago. The only doubt which can arise on this point would be in regard to land acquired by condemnation, subsequent to September 4, 1872, which was the date on which the City of Chicago adopted Article 9 of "An Act to provide for the incorporation of Cities and Villages," which was approved April 10, 1872.

The cases of *Rich v. City of Chicago*, 59 Ill. 286, and *Kine v. Defenbaugh*, 64 Ill. 291, which hold that the method of condemnation prescribed by the Charter of 1863 by means of commissioners and without intervention of a court or jury, was contrary to the provision of the Constitution of 1870, which provides for a jury trial whenever property is taken or damaged, do not in any way affect this point. The only bearing on these cases is as to whether or not condemnations made under the Charter of 1863 after the passage of the Constitution of 1870, gave any rights whatsoever to the City of Chicago. But if the City of Chicago acquired any right whatsoever by such condemnations, there can be no doubt that it acquired a fee.

If the Cities and Villages Act, acted in such a manner as to repeal the provisions of the Charter of 1863 above quoted, then the City has acquired only an easement in lands condemned for street purposes since the adoption of Article 9. If, however, the Cities and Villages Act did not repeal this

section of the Charter of 1863 above quoted, then the City has obtained a fee to all lands condemned for street purposes from February 23, 1863, up to the present time.

By Article 1, Section 6 of the Cities and Villages Act, it is provided that where a city or village changes its organization by adopting the Act,

“All laws or parts of laws not inconsistent with the provisions of this Act shall continue in force and applicable to any such city or village the same as if such change of organization had not taken place.”

Section 12 of the same Article provides that:

“All rights and property of every kind and description which were vested in any municipal corporation under its former organization shall be deemed and held to be vested in the same municipal incorporation upon its becoming incorporated under the provisions of this Act.”

The grant of power to the City of Chicago contained in the Charter of 1863 to take the fee to land when acquiring streets by condemnation, was the grant of such a right as contemplated by that Section of the Cities and Villages Act last quoted. The form of remedy for enforcing that right is changed by the Cities and Villages Act, but there is no mention therein of the nature of the estate to be taken by the City in acquiring private property for streets by condemnation and nothing to indicate that the City's right in that regard is in any way changed. Moreover that provision of the Charter of 1863 which gives that right is in our opinion one of the “parts of law not inconsistent with the provisions” of the Cities and Villages Act, which by the express wording thereof survived the adoption of that Act, and is therefore still in full force and effect.

The Supreme Court has never passed directly upon the question of whether this right, granted to the City of Chicago by the Charter of 1863, survived the adoption of the Cities and Villages Act.

In *Allen v. Young*, 176 Ill. 13, the court, in passing upon a condemnation of land for a street by the City of Chicago in 1890, states:

“When a fee is taken and maintained as a street by the public authorities the owner's easement of the way

is not impaired but still exists, as he has all the right of way before enjoyed."

In *Corrigan v. Chicago*, 144 Ill. 537, the court, in discussing the effect of the condemnation suit brought in 1892 by the City of Chicago to acquire land for a street, says, as to the interests of landlord and tenant therein:

"The effect is an absolute extinguishment of the right and title of both in, or control over, the subject of its demise."

The only case to our knowledge, where the court has held that condemnation by the City of Chicago for street purposes since 1863 gave only an easement, is *Sears v. City of Chicago*, 247 Ill. 204. In that case the court did not mention either the Charter of 1863 or the Cities and Villages Act and said nothing as to changing the rule laid down in the two cases just above mentioned. The opinion merely states that the condemnation, which took place in 1887, "under the law, left the fee to the center of the street in the abutting owners." Of the two cases cited by the court in this regard the first is governed by the Section of the Cities and Villages Act applying expressly to railroad property while the other was a case where the sole point decided was that there was no jurisdiction for a condemnation suit. Neither cases mentioned the Charter of 1863 or in any way applied to the condemnation of private property for street purposes.

We realize that there is considerable weight in the contention that as the Cities and Villages Act does not mention the nature of the estate to be taken by the city in acquiring private property for street purposes by condemnation, and as such taking of property by condemnation is in derogation of the common law right of the owner to the same, it should be strictly construed and only such title held to pass as the Legislature intended to be given by such condemnation proceedings.

There is also weight in the contention that by providing a new and complete system of condemnation, the Cities and Villages Act has entirely superseded those provisions of the Charter of 1863 relating to condemnation. We do not consider, however, that these two contentions are so well settled

or free from doubt that we should be justified in holding that the provision of the Charter of 1863 granting a fee to the city in lands condemned by it, as set forth above, did not survive the Cities and Villages Act, and we feel that any doubt on this question should, so far as this office is concerned, be decided in favor of the city.

It is therefore our opinion that the City of Chicago acquired the fee to all streets taken by condemnation since February 23, 1863, and that accordingly no permit should be issued to Rothschild & Company for the use of space under the sidewalk in front of its premises on State street except in accordance with Section 2302 of The Chicago Code of 1911, and upon the terms as to compensation fixed by that Section.

Yours respectfully,

S. CRAWFORD ROSS,
Assistant Corporation Counsel.

MACLAY HOYNE,
First Asst. Corp. Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

OCTOBER 27, 1911.

MR. HENRY ERICSSON, Commissioner of Buildings.

Dear Sir:

Answering the verbal request of Mr. Robert Knight for an opinion as to what part of the ordinance is referred to in Section 715, which provides that the "written consent of the property owners as required by the city ordinances," must be obtained, we beg to reply as follows:

We are informed that it is proposed to erect a moving picture theater on Lawrence avenue between North Robey street and North Winchester avenue. This theater comes under Class IVc of Article VII of Buildings. Section 330 provides as follows:

"CLASS IVc DEFINED.) Class IVc shall include every building hereafter erected used for moving picture and vaudeville shows and similar entertainments, where an admission fee is charged and regular performances are given, and where the seating capacity does not exceed three hundred, provided that every building of Class IVc existing at the time of the passing of this ordinance shall comply with the provisions of Class IVb."

Section 355 of this same Article provides as follows:

“FRONTAGE CONSENTS REQUIRED.) No building of this class (Class 4C) shall hereafter be constructed for, or converted to the use of said class, unless frontage consents are secured as required by the ordinances of the City of Chicago and filed with the commissioner of buildings.”

Section 715 of the same Code, under the subject of “Buildings,” Article XXIV, “Frontage Consents” provides as follows:

“AMUSEMENTS—FRONTAGE CONSENTS REQUIRED.) It shall be unlawful for any person, firm or corporation to construct or erect any building designed or intended to be used for the purpose of presenting or carrying on therein any entertainment for which a license is required by the ordinances of the City of Chicago without first obtaining the written consent of the property owners as required by the city ordinances.”

The question which your department is interested in, is which of the city ordinances is referred to in both Section 355 and Section 715?

In Section 106 of the same Code, Chapter VI, “Amusements” are divided into 21 classes of entertainment, for which a license is required by the ordinances of the City of Chicago. The 4th class includes:

“All exhibitions consisting solely of moving pictures, known as mutoscope, kinetoscope, cinematograph, kaleidoscope, penny arcades and places in which amusement is furnished through or by one or more automatic picture devices, or similar devices.”

Section 117 of the same Chapter provides for Frontage Consents for *all* of the 21 classes and provides as follows:

“FRONTAGE CONSENTS AND OTHER PROHIBITIONS.) It shall hereafter be unlawful for any person, firm or corporation to produce, offer, present or carry on any of the entertainments of any of the foregoing classes, excepting entertainments of the 7th class and 10th class and entertainments given within the grounds occupied by said 7th class or 10th class, on any street in any block in which two-thirds of the buildings on both sides of the street are used exclusively for residence purposes, without the written consent of a majority of the property owners according to frontage on both sides of such street

in such block; provided, however, that nothing herein contained shall apply to the foregoing classes of entertainments produced, offered or presented prior to the first day of January, A. D. 1910. * * *

It will be thus observed that it is unlawful to carry on any entertainment of the 4th class, "On any street in any block in which two-thirds of the buildings on both sides of the streets are used exclusively for residence purposes" without securing a majority of the frontage consents. The specific question in this opinion is whether in determining whether or not two-thirds of the buildings on both sides of the street are used exclusively for residence purposes, shall we take into consideration only the buildings on the street where it is proposed to erect the moving picture theater, or does the ordinance require that we take into consideration the buildings of the *entire square block*, for the purpose of determining whether two-thirds of the buildings are devoted to residence purposes.

This question has been raised by Harris F. Williams, an attorney, who represents several objecting property owners, and in particular one or two of the churches in this locality. Mr. Williams claims that under our Supreme Court decision of *Harrison v. People*, 195 Ill. 466, the word "block" means the entire quadrangle bounded by the four nearest streets. The reasoning upon which that decision is based, is as he claims, that a moving picture theater, is similar to a dram-shop, and that its demoralizing effect is not limited to the street upon which it fronts, but by its contiguousness affects or might affect injuriously all the property in the entire square; and that the word "block" accordingly, must be construed to mean the entire square bounded by the nearest four streets.

I desire further to point out that this law was followed, but distinguished in the case of *Patterson v. Johnson*, 214 Ill. page 481. The language of the ordinance of that case was almost exactly the same as the language in Section 117 regulating entertainments, except that in the case of *Patterson v. Johnson*, the ordinance had an additional provision that "in determining whether two-thirds of the buildings on both sides of the street are used for residence purposes, any building

fronting upon another street and located on a corner lot shall not be considered." The court held in this case that the reference to the building "fronting upon another street" limited the word "block" to mean the street, between two intersecting streets and thus distinguished this case from the case of *Harrison v. People*, and held that a street did not mean a square.

The intention of the counsel, however, in section 117 was clear that a "square" was not intended, because the second paragraph of this section make an *express* exception that in entertainments of the 7th and 10th class the word "Block" shall mean a square. This second paragraph of Section 117 provides, in part, as follows:

"It shall hereafter be unlawful for any person, firm or corporation to produce, offer, present or carry on entertainments of the 7th class or 10th class, as hereinbefore defined, in any block or square in which two-thirds of the buildings on both sides of the street or streets around such block or square are used exclusively for residence purposes, without the written consent of the owners of a majority of the frontage on both sides of the street or streets on each side of the block or square in which it is desired to produce, offer, present or carry on the aforesaid class of entertainments."

Even if the intention was not clear in section 117, yet sections 117 and 715 must be construed together. Section 715 refers to Section 117 and becomes a part of it for all intents and purposes as if section 117 had been printed in section 715 verbatim.

In this same article, in which we find 715, the Council has fortunately seen fit to give a definition of the word "block" in order to prevent any ambiguity. Section 711, Article 24, Frontage Consents, in the *same chapter* on buildings is as follows:

"Whenever a provision is made in this chapter that frontage consents shall be obtained for the erection, construction, alteration, enlargement or maintenance of any building or structure in any block, the word 'block', so used, shall not be held to mean a square, but shall be held to embrace only that part of a street bounding the square, which lies between the two nearest intersecting streets, one on either side of the point at which such

building or structure is to be erected, constructed, altered, enlarged or maintained, *unless it shall be otherwise specifically provided.*"

There being no other specific provision as to what the word "block" means, we are of the opinion that Section 711 controls and if two-thirds of the buildings on Lawrence avenue between North Robey and North Winchester avenue are not devoted exclusively to residence purposes, then and in that event, it will be lawful to maintain a moving picture theater on that street.

Respectfully submitted,

MAX M. KORSHAK,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

OCTOBER 30, 1911.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Your letter concerning overcharges of cabmen and making certain inquiries about the scope of ordinances now in force relating to cabs and taxicabs and the legality of requiring public passenger automobiles to have taximeters, to which was attached a communication from Mr. F. O. Melcher, was referred to me for reply.

The complaint was on account of the failure of cabmen to post the legal tariff within the vehicle, and also their failure to display their license numbers on their lamps in such a way as to make them readable.

The ordinances seem to be adequate to meet the conditions mentioned. Section 2565 of The Chicago Code of 1911, relating to passenger vehicles drawn by horses, requires that every vehicle of this character shall have a lamp on each side with the license number painted in black on the side of each lamp, in distinct and legible figures at least 1½ inches in length, and so placed that same may be distinctly seen from the outside of the vehicle. Section 2572 provides that there shall be fixed on the inside of such vehicle, in a conspicuous place, so that the same may be easily and conveniently read

by the passenger, a card obtained from the City Clerk on which is printed the name of the owner, the license number, and the whole of four sections of the code, containing complete legal rates of fare for both one-horse and two-horse vehicles, and the provisions relating to carrying baggage and the delivery of lost baggage. The Mayor is also given the power to revoke the license upon the recommendation of the board of inspectors of public vehicles.

You next ask whether it would be legal to require all automobiles engaged in cab or passenger service to be supplied with taximeters.

Under its powers to prescribe the compensation, as well as to license, tax and regulate such business (Clause 42), the city has the right to impose a requirement of this kind if it tends to check abuses. The general rule governing the situation has been stated as follows:

“The grant of the power to regulate the occupation, and prescribe the compensation of those pursuing it, is accompanied by a grant of power to pass all such ordinances, rules and regulations as may be proper or necessary to carry into effect the power so granted.”

Union Traction Co. v. City of Chicago, 199 Ill. 523.

In construing Clause 42, our Supreme Court said:

“It is designed to operate upon those who hold themselves out as common carriers in the city, for hire, and to so regulate them as to prevent extortion, imposition and wrong to strangers and others compelled to employ them, in having their property or persons carried from one part of the city to another.”

Farwell v. City of Chicago, 71 Ill. 269.

In the exercise of this power the city has required the attachment of devices from time to time, such as lamps on sides of cabs, thermometers in street cars, etc. Such a provision therefore, if reasonable, and if it tends to prevent overcharge and to better regulate the occupation, as the one proposed undoubtedly would, is unquestionably authorized by said clause.

You have also asked for a copy of the recent amendment to the taxicab ordinance. This was passed June 19, 1911 (C. P. 532-3), and published in the Evening Post on

July 3, 1911. I send a marked copy of said publication herewith.

Yours respectfully,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

OCTOBER 31, 1911.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

In the matter of the above alleys, submitted with your communication of the 26th inst., I find the following facts:

1—From the report of John D. Riley, Esq., Superintendent of Maps, dated October 23, 1911, it appears that part of Lots 3 and 4 of Block 140, School Section Addition to Chicago was laid out as a public alley in 1848 and has been used as such ever since. (See plat marked "A" in yellow.)

2—The triangular portion on the west arm of said "T" alley is part thereof and has been encroached upon by the Baltimore Building. It is now proposed to build upon the east arm of said "T" alley.

3—The portions colored blue upon the plat are private passageways by the terms of certain deeds.

4—That part colored blue underlying red patched lines is open ground, which forms no part of the public alley and is not designated as a private passageway in any deed.

5—In 1888 said public alley, open ground and private passageways were ordered paved by ordinance. This improvement was made according to law.

Following the foregoing facts I am of the opinion that any encroachment upon the triangular portion of said "T" alley should be prohibited.

While admitting the legal force of the improvement by the City of all of said open ground and private passageways, I am yet constrained to hold under the weight of *Chicago v. Borden*, 190 Ill. 430, that thereby the private character of said property, has not undergone any change.

The City will proceed to protect its public property, and the owners of the lots in question will find their remedy in the courts.

All enclosures are herewith returned.

Very truly yours,

NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 2nd, 1911.

HON. CHARLES M. THOMSON, Alderman, Twenty-fifth Ward.

Dear Sir:

Your letter of recent date relating to the proposed extension of the German-American Hospital, located on Diversey Boulevard between Halsted and Clark streets, was referred to me for an opinion.

It seems that this hospital was established on the property in question several years ago, when it was not necessary to secure frontage consents for the purpose of locating a hospital of this description. Not only the main building, but the grounds and some outbuildings as well, have been used right along for hospital purposes. The owners contemplate the erection of an additional building on the same ground that is now and has heretofore been used for hospital purposes.

This is objected to by neighboring property owners, who assume that Section 265 of The Chicago Code of 1911, requiring frontage consents for all hospitals in residential districts, applies to additions or extensions of an existing hospital as well as to a new institution. This section (265) provides for such consents for "building, constructing or maintaining, managing or conducting" a hospital in such a block.

Section 711 of the Code defining the word "block", says that "whenever a provision is made in this chapter that frontage consents shall be obtained for the erection, construction, alteration, enlargement or maintenance of any building or structure" the word shall be held to mean only the part of the street between the two nearest intersecting streets at either

side of the point at which such building or structure is to be "erected, constructed, altered, enlarged or maintained", unless otherwise specifically provided.

The fact that the words "erected, constructed, altered, enlarged or maintained", are twice used in this section in itself indicates that the provision for frontage consents in Section 265 does not apply to alterations or enlargements, since the additional words "altered" and "enlarged" in Section 711 must be understood to have some meaning.

There are also other sections of the Code which clearly indicate that it was the intention of the Council to exclude alteration and enlargement from provisions of this kind unless specifically mentioned. In Section 712 such consents are provided for in case of "construction or alteration" of structures mentioned therein. In Section 712½ frontage consents are required to "locate, build or construct" a retail store in a block used exclusively for residence purposes. In Section 713 these consents are required for the "construction, alteration or maintenance" of a reformatory. Again, in Section 358 provision is made for frontage consents for grandstands except for such as are now constructed or in process of construction, which may be "erected, repaired or enlarged" without such consents. It will thus be seen that the City Council has definitely so stated whenever it has meant to include repairing or enlargement when it speaks of building, constructing or maintaining.

In view of the fact that the party occupying the premises in question acquired rights before the ordinance which is invoked went into effect, and possibly even before the statute on which the ordinance was based was enacted, it is extremely doubtful whether, in case the ordinance had been so framed as to bear the interpretation asked for, it would have withstood the test of legality.

The owner, therefore, unquestionably has the right to repair, alter or enlarge the present building or buildings. His right to put up in addition in the shape of an entirely new building while not so manifest, is equally complete, since it is not the building but the occupation that makes it necessary to secure the frontage consents. If he has the right to enlarge

by any process, it must include the right to enlarge by an additional building.

It may be urged that while nothing can be done to prevent the occupant from using as a hospital, a building or place that was so occupied before, and from repairing, altering or even enlarging it, still when he applies for a permit for the erection of a new building, he must conform to the provisions in the building code, and must obtain the necessary frontage consents if the present ordinance provides for same.

Such a contention, however, is not tenable where the occupation furnishes the basis of regulation rather than the building itself. The same building which is to be used for hospital purposes could be erected for another use without frontage consents. Hence it is not the building for which frontage consents are required but the use to which it is put.

The right of so using the premises has already been acquired, and to say now that it cannot be used because a new building is being erected thereon would be to take away a right now possessed.

I am, therefore, of the opinion that the City cannot legally prevent the erection of an addition to the hospital mentioned above, provided it is confined to the property now used for hospital purposes.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 3, 1911.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

The above matter, which was referred to this department with the communication of H. V. McGurran, Superintendent Bureau of Compensation, dated October 27, 1911, presents the following facts:

1—October 26, 1857, O. A. Bogue, recorded in the Recorder's Office of Cook County a plat of that part west of Rail-

road, of the North East quarter of the South East quarter of Section 9, Township 38 North, Range 14 E. *This plat shows streets and alleys in said subdivision and among them the alley in question.*

2—September 30, 1874, Frank Monroe and wife conveyed to the Chicago, Rock Island and Pacific R. R. Company, Lots 101 to 150, both inclusive, in said subdivision.

3—May 6, 1885, the Board of Trustees of the town of Lake passed an ordinance for the paving, by special assessment, of 51st street from State street to Stewart avenue, excepting only the right of way of said Railroad and the intersection of Wentworth avenue.

4—The assessment roll in said case in the County Court, shows that the C. R. I. & P. R. R. Co., as the owner of Lot 150 in said subdivision (see plat), was assessed as follows: (Ex. Sts.) That part lying west of Railroad right of way of S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ 9-38-14.

5—June 10, 1885, the Board of Trustees of the town of Lake passed an ordinance to put up 14 lamp posts on 51st street between the right of way of the C. R. I. & P. R. R. Co. and Stewart avenue.

6—The petition of the town in the County Court, for an assessment for said lamp posts, has annexed to it a plat which shows that one of said lamp posts was to be put up on the North side of said street adjoining the right of way of said railroad, while on the south side of said street is shown the alley here in question.

7—September 4, 1888, the Board of Trustees of the town of Lake passed a resolution that it is the sense of this board that the C. R. I. & P. R. R. Co. be permitted to lay four tracks across 51st street and 53rd street provided the town attorney reports at a future meeting in what manner this could be done.

8—July 9, 1894, the City Council passed what is known as the L. S. & M. S. and C. R. I. & P. Ry. track elevation ordinance. Par. 4 of Section 5 of said ordinance provides as follows:

“Whenever alleys, which parallel the joint right of way of said railway companies on one or both sides

thereof, are found to be open and to intersect the streets or avenues in which said subways are to be constructed, all of said alleys, so found to be open as aforesaid, shall be properly graded down into the streets or avenues with which they intersect, but at the expense of said railroad companies, or either of them, as the case may be."

9—The maps on file in the Map Department of the City and County, show said alley as still existing.

10—The maps in the office of the Board of Assessors make the same showing.

11—I fail to find that said alley has been vacated by the Board of Trustees of the town of Lake, or by the City Council, in the manner prescribed by statute.

12—I fail to find that said alley has ever been vacated by deed, by the owner or owners of lots in said subdivision.

Basing this opinion upon the foregoing facts, my conclusions are as follows:

1—The alley in question was properly dedicated according to Statute and has never been vacated in any of the modes known to the law.

2—The acceptance by the Board of Trustees of the town of Lake of the streets in said subdivision is a sufficient acceptance of the alleys shown on the plat thereof.

3—The affidavits submitted by the Railroad Company are insufficient to overcome the record and merely go to show that possession of the alley was acquired without legal right, even though public officials closed their eyes to the unlawful taking.

4—The Company cannot base any valid claim to said alley upon the passage of the ordinance ordaining the elevation of its tracks, in the absence of some act or deed affirmatively granting it the right to occupy the same.

Two wrongs do not make a right, and the claimant in this case should not be permitted to take advantage of its own wrong act in thus benevolently assimilating said alley.

Very truly yours,
NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved.

WM. H. SEXTON,
Corporation Counsel.

All enclosures are herewith returned.

NOVEMBER 4, 1911.

HOMER K. GALPIN, Esq., Clerk Municipal Court.

Dear Sir:

The above matter which has been submitted to me with the communication of Frank L. Shepard, Esq., of the 3rd inst., presents the following facts:

1. Section 58 of the Municipal Court Act of 1905, as amended in 1907, provides that in cases for the violation of an ordinance other than an ordinance of the City of Chicago *one-half of all the fines and penalties* collected shall be paid over by the Clerk every month to the other municipal corporation or Board of Public Park Commissioners *in whose favor such judgment shall have been entered.*

2. Section 1 of "An Act to provide for the setting apart, formation, administration and disbursement of a park police pension fund," (Approved March 31, 1911. In force July 1, 1911) provides that:

*"All fines and penalties collected for violations of any of the ordinances of such board * * * of park commissioners or of any of the laws of the State of Illinois as now in force, within the territory under the control of such board of park commissioners, in all cases in which arrests for violation of such law shall be made by officers of such police department."*

shall be set apart with other moneys named, to constitute a police pension fund.

3. Section 269s, of Ch. 121, Revised Statutes, (Hurd's), which is part of the so-called "Motor Vehicle Law" of 1907, provides for the payment of *all fines* for the violation of any of the provisions of the Act, to the Park Commissioners *within whose jurisdiction the offense is committed.*

The first two of the Acts above enumerated in so far as they relate to the fines collected for violations of park ordinances, appear to be so clearly in conflict that unless otherwise reconciled, the latter must be held to be a repeal of the former, by implication.

Section 34 of Art. IV of the Constitution, under the terms of which the Municipal Court has been established, provides:

"No law based upon this amendment to the constitution, affecting the Municipal government of the City of

Chicago, shall take effect until such law shall be consented to by a majority of the legal voters of said city voting on the question at any election, general, municipal, or special." * * *

The Municipal Court Act as amended in 1907, which is *based upon the foregoing amendment* to the constitution, provides that *one-half* of all the fines and penalties collected for the violation of park ordinances shall be paid to the City of Chicago, while the park police pension fund Act of 1911, which is a general law of the State and, therefore, *not based upon said amendment*, provides that *all* fines and penalties collected for such violations, shall be set apart for a park police pension fund.

Repeals by implication are not favored by the law. We are, therefore, constrained to apply to these acts the well known canons of construction, in order to so harmonize their apparently irreconcilable provisions, that both may stand, if that be possible.

The intention of the legislature may be gathered from the context of these laws and the words employed in framing the acts in question.

The Municipal Court Act provides that the clerk of said court shall pay monthly *one-half* of all the fines and penalties collected to the Board of Public Park Commissioners *in whose favor such judgment shall have been entered*.

Section 1 of the Park Police Pension Fund Act provides:

"That whenever any persons have been or may be appointed or otherwise selected as commissioners or other officers and constitute a board of park commissioners and shall have established a police force * * *, *there shall be set apart the following moneys* to constitute a police pension fund.

5. *All fines and penalties collected* for violations of any of the ordinances of such board of park commissioners * * * in all cases in which arrests for violation of such law shall be made by officers of such police department."

Can it be said that it was the intention of the legislature to cast upon the Clerk of the Municipal Court the duty of setting apart the moneys which under the above provisions, shall constitute the police pension fund of each of the three

park boards? Clearly not. This duty is cast upon the respective park boards which collect these moneys monthly from the Clerk of the Municipal Court, whose duty in the premises is defined in the Act creating said court, above quoted.

This construction, which appears to be based upon sound reason, keeps both acts in force and makes a discussion of the constitutional point involved, unnecessary.

In the present case both acts can work harmoniously under the foregoing construction which casts upon the Clerk of the Municipal Court under the Act creating said Court, the duty to pay *one-half* of the fines and penalties collected by him for violations of park ordinances to the respective park boards, and upon these bodies, under the pension Act, the duty of setting apart *all* the fines and penalties *so collected*, in cases where the arrest is made by its own police, to constitute a part of the pension fund created by the Act.

Very truly yours,
NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 8th, 1911.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Your letter transmitting the communication of Hon. Thomas A. Smyth, President of the Sanitary District of Chicago, proposing a compromise settlement in the dispute arising from the claim against the South Side Elevated Railroad Company, was referred to me for consideration.

You asked to have the matter investigated and to be advised as to the proper policy to be adopted by the City concerning same, indicating that you favored such harmonious settlement of the difficulty unless there was some reason for contrary action. I, therefore, assume that you wish full information on the subject and a recommendation from this Department, rather than an opinion as to the merits of the controversy from a legal point of view, and respectfully submit the following:

The Pure Water Commission reported plans for a system of intercepting sewers, conduits and pumping stations, designed to purify the water supply of the City, which were accepted by the City Council on March 1, 1897, and appropriate action was taken thereon.

Afterwards, on January 31, 1898, by ordinance of the City Council, these plans were somewhat modified. The conduit at 39th street was increased in size to a diameter of twenty feet, to extend from Lake Michigan to the Halsted Street Slip, otherwise known as Bubbly Creek, and other changes were made. The ordinance also provided that the Commissioner of Public Works was to turn over all pumping stations and machinery and fixtures necessary to make the intercepting sewer system effective to the Sanitary District of Chicago, upon condition that thereafter the Sanitary District should permanently maintain same, make all improvements and repairs, and increase the capacity, if necessary, at its own expense, and authorized the making of a contract for the purpose of effecting this result. The Board of Trustees of the Sanitary District on February 4, 1898, passed an ordinance accepting the conditions of the above ordinance and agreeing specifically to carry out the terms of same.

Thereupon, on November 18, 1899, a contract based on the foregoing ordinances was entered into between the two municipalities. The contract did not fix any date for the taking over of the property in question. It required the City to complete the improvements at its sole cost and expense in a manner satisfactory to the Sanitary District. The minimum capacity of the 39th street pumping station was to be 40,000 cubic feet of water per minute.

This contract was afterwards supplemented by another agreement dated October 23, 1902, whereby an arrangement was made for an increased pumping capacity at the 39th street pumping station so as to make such capacity 120,000 cubic feet of water per minute. This arrangement contemplated that the Sanitary District was to pay 45 per cent. of the total cost of such pumping station, it being understood that the City was to pay the entire cost of the pumping machinery necessary to supply the 40,000 cubic feet, and the Sanitary

District to pay the entire cost of such machinery necessary to supply the additional 80,000 cubic feet.

Before the 39th street conduit was completed, on January 25, 1904, by an ordinance of the City Council, the Sanitary District was given the right to construct and maintain in 39th street, between Wabash avenue and State street, a five-foot water tunnel and a three-foot return pipe, connecting the power house of the South Side Elevated Railroad Company and the 39th street conduit, for the purpose of supplying the power house with water from the conduit and of returning same after being used for cooling purposes. Such construction was to be without cost to the City of Chicago. This ordinance was afterwards amended on March 19, 1904, so that the period covered by the grant was extended to fifteen years, terminating January 25, 1919.

The Sanitary District in turn (on May 6, 1904) made a contract with the South Side Elevated Railroad Company whereby the latter assumed all the expense of construction work for the tunnel and return pipe authorized as above, and agreed to pay to the Sanitary District, for the use of water for condensing purposes, the sum of one dollar per year for each rated boiler horse power of the boilers used in the power house. There were other provisions covering defaults, forfeitures, notices, etc., in this contract which do not enter into the present controversy.

It is obvious that the understanding contemplated that the Sanitary District would have the pumping plant and would be operating it when the Railroad Company should begin taking water. In that event there would have been no controversy or dispute, since the City would not then have furnished any water and would have made no claim for compensation. The City has never taken the position that it would be entitled to rentals for water after the pumping station was turned over to the Sanitary District.

But the Railroad Company began taking water on March 1, 1906, and the plant was not turned over to the Sanitary District until April 30, 1910. In the interim there had been an accumulation of bills for water amounting to \$38,136.06. This amount, from which must be deducted \$338.20 allowed to

the Railroad Company and master in chancery for costs by the court, is still unpaid. The bills since May 1, 1910, have also been accumulating at the rate of \$9,800.00 per year, and the Railroad Company withholds pay on them pending the settlement of this controversy. The City, of course, does not lay claim to anything accruing since May 1, 1910.

Shortly after beginning to take water, June 25, 1906, the Railroad Company went into court and asked for an injunction restraining the City from cutting off its water supply, representing that the City officials, after demanding compensation for the amount used, had threatened to deprive it of water. A temporary injunction was granted. Thereupon the Railroad Company began a second proceeding, filing its bill of interpleader, representing that it was ready and willing to pay for the water but that since both municipalities claimed the compensation it was necessary to bring them into court in order to adjust the conflicting claims. In this later case such proceedings were had that a decree was entered in March or April, 1907, by Judge Windes, based on the findings of the master in chancery, fixing the amount due from the Railroad Company on March 1, 1907, as \$7,102.73, requiring the latter to pay that amount to the clerk of the court, where it has remained ever since, and allowing the costs referred to above. Since then there has been no further action taken in court, and the balance of the compensation due remains in the possession of the Railroad Company. Consequently, besides the sum paid into court, the Railroad Company holds \$31,033.33 which the city claims and about \$15,000 due the Sanitary District, including the last semi-annual installment due, making a grand total of about \$53,000.00, which is being withheld from the two municipalities on which no interest can be taxed. In case the matter is fought out in the courts with the utmost diligence, if both sides continue stubborn and appeal to the reviewing courts, it will be impossible to secure a final adjudication in less time than seven or eight months, and it will probably take longer.

In this controversy, the position taken by the Commissioner of Public Works and the City's Law Department was that the City was shouldering all the expense of the construc-

tion and maintenance of the conduit and pumping station, and that until these were taken over by the Sanitary District, the compensation for the use of the water was properly payable to the City. In case the matter is threshed out in the courts it will be further urged by the City Law Department that the Sanitary District is given no power to make contract of this kind for the use of water, but since this is a purely technical point, it does not figure in the adjustment of the equities involved.

The claim of the Sanitary District is based on the fact that the City authorities fully understood the use to which the conduit and return pipe connecting with the Railroad Company's power house were to be put, at the time they granted the privilege of constructing and maintaining them to the Sanitary District, and that there was no privity of contract between the City and the Railroad Company, while the latter had contracted to pay the compensation to the Sanitary District. The claim is also made that the use of the water entailed absolutely no expense nor the rendering of any service on the part of the City, and that it, therefore, cannot claim compensation on the theory that it had furnished anything for which it could make a claim in the absence of an express contract.

In support of the last contention, the chief engineer of the Sanitary District states that the water in Bubbly Creek is from one and one-quarter to two feet lower than the lake level, and that upon the construction of the 39th street conduit there was a natural flow of water sufficient to send from 40,000 to 50,000 cubic feet of water per minute through the conduit without the aid of artificial power. He further states that of the present equipment of six pumps the four centrifugal pumps installed and maintained by the City did not add to this flow of water in the slightest degree, but simply lifted the sewage from the intercepting sewer from twelve to fifteen feet and emptied it into the conduit, thereby displacing the same amount of lake water. He gives it as an engineering proposition which cannot be disputed that the same amount of water would have gone through the conduit without the centrifugal pumps in case they had not been operated. The

two screw pumps installed at this pumping station handle lake water and increase the flow of water in the conduit, but the expense of operating these was borne by the Sanitary District and all charges of the City relating to same were disposed of in the final settlement when the pumping station was taken over.

In order to settle the dispute it is now proposed by the Sanitary District that each of the municipalities should take one-half of the compensation earned up to May 1, 1910, which would mean that of the sum of \$37,797.86, the net amount due on that date after deducting the expenses allowed by the court, the City would receive \$18,898.93, yielding a like amount of same to the Sanitary District.

While the amount involved is in itself a considerable sum, such a compromise can hardly be placed on the same plane as the settlement of a like claim against a private party. The division of the above sum between the two municipalities does not mean that the money is sacrificed or lost to the people. The two municipalities overlap each other to such an extent that ninety-five per cent. of the population of the Sanitary District resides within the corporate limits of the City. The disposition of the money in the manner proposed would mean practically that the same people would get the use of the money but that it would be expended differently than if either of the corporate bodies prevailed over the other in the courts. Also that the expenses of the litigation on both sides would be saved to the people.

There is no legal obstacle in the way of such a settlement as is proposed, since a municipality has a right to settle disputed claims and lawsuits through its properly constituted authorities.

It was proposed by the Sanitary District in the spring of 1910 that a settlement be made whereby the sum of \$5,411.36 was to be deducted from the amount in dispute and paid to the Sanitary District, and the balance divided by the municipalities, but this proposition was rejected by the Committee on Finance of the City Council. Afterwards the present plan of adjustment was proposed, but the Committee failed to take

action until some time in March, 1911, when it declined to make an adjustment.

A precedent for such a settlement as is proposed may be found in the recent adjustment of all adverse claims in relation to the pumping station in question between the same two corporate bodies. When the City Council first considered the settlement of all adverse claims growing out of the erection, operation and transfer of this pumping station the agreement proposed by the Committee on Finance on February 14, 1910, (C. P. p. 3130) contemplated the wiping out of the claim of the Sanitary District of upwards of \$500,000.00 for work done on certain bridges, and the waiver by the City of all claims for the pumping station except for the sum of \$121,970.10. This agreement in a somewhat modified form was approved by the City Council and an order authorizing and directing such an agreement to be entered into was passed on February 28, 1910. (C. P. 3282.) Afterwards, on April 1, 1910, a new order and form of agreement was submitted and passed by the City Council (C. P. 3780), and later slightly amended. (C. P. 3798.) By the terms of this new agreement, finally adopted by both municipalities on April 13, 1910, (see Proceedings of B. of T. of San. Dist., April 13, 1910, p. 391-5), which was made as of the same date as the agreement first proposed, the City's claims assented to and not waived amounted to \$227,209.91.

While, undoubtedly, there was some good reason for altering the figures as above, I call attention to them as illustrating the fact that an adjustment was reached in a matter where the figures were enormously greater and the disputed amounts subjected to much more alteration than those in the present controversy. If, therefore, as may well be believed, the people of the two municipalities would not look with complacency on a legal tussle over the money involved which would only result in determining which of them should expend it, there does not seem to be any good reason for prolonging the struggle.

While, therefore, this department is prepared to contest the case and bring about an early adjudication of the rights of the respective parties thereto, it recommends a settlement

on the basis proposed, giving each municipality one-half of the money in dispute.

Respectfully submitted,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 11, 1911.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Your request for an opinion regarding the city's power to summarily stop shows where obscene and salacious conversation and jokes are indulged in by characters taking part in the performance was referred to me.

An immoral show has always been held to be a nuisance per se, which no one has a right to maintain, and which the municipal authorities have ample power to suppress and prevent. This includes the power of summary abatement, the only limitation on such power being that it must be exercised in a manner that does not unnecessarily interfere with other rights, as illustrated below.

The use of indecent language on the public stage is referred to Section 55 of the Criminal Code, and contrary to Sections 2024, 2025 and 2026 of The Chicago Code of 1911. There are also other provisions of the Statutes and ordinances which appear broad enough to cover an offense of this character. It is therefore within the power of an officer to arrest a person guilty of such an offense immediately upon the commission of same, without waiting for the issuance of a warrant or summons.

But the arrest of the person offending public decency in this way is not the only method of dealing with this evil. The city authorities have no right to assume that an offense of this kind will be committed until it is actually done, but it having been once perpetrated, they are not bound to wait for a court's adjudication nor even for absolute proof nor until the offense is repeated before taking summary action if they

know or have reasonable grounds for believing that it would be repeated unless the show in question is stopped.

Under Section 8, of Article II, of the Cities and Villages Act, the Mayor is given the same powers as a peace officer within the municipality under his control as those conferred upon sheriffs elsewhere in the statutes. This alone gives him the necessary power to act in such cases. Aside from that the municipality is given express power to prevent disorderly conduct (clause 59), and to abate nuisances (clause 75), and this power, lodged in the Mayor as the chief executive officer charged with the duty of preserving order and keeping the peace, may be summarily exercised in the case of a nuisance *per se*.

While such nuisance can be stopped by the closing of the show, however, the prohibition cannot be extended to another show in the same place which is free from objectionable features of the kind mentioned. That would be such an unnecessary interference with private rights as has already been referred to.

Tiedeman's Limitations of Police Power, Sec. 122g.

In the *City of New Orleans v. Chappius*, 105 La. 179, the court held that the owner of a building in which she has maintained a house of ill fame will not be forced to move from her house, on notice from the Mayor to that effect, if she immediately alters her conduct, and abandons her occupation, though she may be punished for her past acts on substantive charges and proof.

In the Section referred to above, Tiedeman quotes from an opinion of the Supreme Court of Michigan, as follows:

"That which constitutes or causes the nuisance may be removed; thus if a house is used for the purpose of a trade or business, by which the health of the public is endangered, the nuisance may be abated, by removing whatsoever may be necessary to prevent the exercise of such trade or business; so a house in which gaming is carried on, to the injury of the public morals; the individual by whom it is occupied may be punished by indictment and the implements of gaming removed; and a house in which indecent and obscene pictures are exhibited is a nuisance, which may be abated by the removal of the pictures. Thousands of young men are lured to

(some of) our public theaters, in consequence of their being a resort, nightly of the profligate and abandoned; this is a nuisance. Yet in this, and in the other cases stated, it will not be contended that a person would be justified in demolishing the house, for the obvious reason that to suppress the nuisance such an act was unnecessary.”

Welch v. Stowell, 2 Dougl. (Mich.) 332.

The power of the city authorities, therefore, extends to the class of cases in question, and seems to be ample, especially in view of the fact that there are provisions in the ordinances for revoking the licenses at places where such offenses are persisted in.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 13, 1911.

HON. CHARLES J. FORSBERG, Alderman, Thirty-fifth Ward.

Dear Sir:

We have before us a petition addressed to the Mayor and the Council of the City of Chicago petitioning that action be taken with reference to the removal of the plant of the Garden City Fireworks Company. This petition is signed by a large number of property owners and residents of your ward and we understand that you are greatly interested in having the above plant removed.

The petition recites that the plant consists of twenty or more buildings which are used for the manufacture and storing of fireworks in which high explosives are used, and that there is constant danger of explosions, and that this danger operates to terrify the residents who have their homes in the vicinity of this plant.

The petition further recites that at the time the plant was located, the territory was outside of the city limits; and that now the plant is within the city limits and in the midst of a large and growing population; and that the population in the

district surrounding the fireworks plant would increase much faster if the nuisance created was removed.

We have received a report from Charles F. Seyferlich, Fire Marshal, and from this report we learn that the name of the plant is the Consolidated Fireworks Factory instead of the Garden City Fireworks Company. This report further states that the Consolidated Fireworks Factory are properly licensed to use and handle gunpowder, have filed a bond of \$10,000 to protect the City against any loss and have secured three certificates of fitness for their employes who handle the gunpowder, and that all of the provisions of Chapter XXXV relating to "Gunpowder, Dynamite and Explosives" have been complied with. Upon investigation we find that this is correct.

Section 1068 of this same chapter of The Chicago Code of 1911 makes it unlawful for any person to keep or sell any gunpowder, guncotton, blasting powder, giant powder, dynamite, nitroglycerine, fulminate of mercury, loaded paper or metallic shot shells or cartridges, or percussion caps or primers or detonators, excepting in the manner provided by the above chapter and under a license issued by the Mayor upon the recommendation of the Fire Marshal.

We have gone into this matter very carefully and find that the only explosive included in Section 1068, which is used is gunpowder; and that in all one hundred pounds of this gunpowder is kept in a magazine in accordance with the provisions of our ordinances. This one hundred pounds of powder is much less than what they can lawfully keep on the premises, for under Section 1086 they are permitted to construct magazines capable of containing explosives to the extent of twenty-five hundred pounds, provided they furnish the City with a bond in the sum of five thousand dollars for each fifty pounds of gunpowder, as required by Section 1073. This last provision as well as all other provisions of Chapter XXXV relating to "Gunpowder, Dynamite and Explosives," has been complied with.

Our information is further that the buildings are principally used for the storage of fireworks, such as fire crackers, torpedoes, sky rockets, roman candles, etc. Very few fire-

works are manufactured on the premises, as the principal business of the plant consists in manufacturing railroad fuses, which are not explosives.

While Section 1094 of the Chicago Code of 1911 makes it unlawful for any person to *manufacture* any gunpowder, gun-cotton, giant powder, dynamite, nitroglycerine or fulminate of mercury, yet we understand that neither these nor any explosives as contemplated by our ordinances are *manufactured* at this plant. While it is true that fireworks are manufactured at this plant, yet we cannot find anything in our ordinances which prohibits the manufacture of fireworks, and the manufacture of fireworks is just as lawful as the manufacture of any other commodity.

There are, however, regulations governing the sale and storage of fireworks and these are to be found in Article 2, Chapter XXVII. We have gone into this article very carefully and find that all of its provisions have been complied with, and especially Clause b of Section 951, which provides as follows:

“That the applicant will not keep the articles mentioned in the foregoing section in any building located within the fire limits of the city, outside a fireproof vault, for a longer period than fifteen days prior to and including the fourth day of July, unless said articles are securely boxed or cased, and that the applicant will not expose for sale such articles to any consumer or user located within the city prior to the first day of July nor after the fourth day of July.”

Under this clause you can readily see that it is lawful to keep the fireworks enumerated in this section for a longer period than fifteen days prior to and including the fourth day of July, if such articles are securely *boxed* and *cased* and are not exposed for sale to any consumer or user located within the City prior to the first day of July, nor after the fourth day of July.

We have sent out a special investigator from this office to the plant of the Consolidated Fireworks Factory and he has informed us that all the fireworks stored at the plant are carefully packed and stored in accordance with the ordinances regulating same, and are not exposed for sale at any time.

In view of the above we are, therefore, of the opinion that the Consolidated Fireworks Factory are complying with all of the provisions of our ordinances with regard, first, to the storage of "Gunpowder, Dynamite and Explosives" as provided in Chapter XXXV, and secondly, with the provisions of Chapter XXVII regulating the use and sale of "Firearms, Fireworks and Cannon;" and we are, therefore, of the further opinion that they are engaged in a lawful business and that if it is desired to take any action toward causing the removal of the Garden City Fireworks Company, a new general ordinance would have to be passed.

The right of the City to pass laws similar to our present ordinances regulating the use of explosives is clear. This right is given to the City by the Cities and Villages Act, under Clause 65, Chapter 24, Hurd's Revised Statutes 1908, giving the City the right to "regulate and prevent the storage of gunpowder" and other explosives; under Clause 66 of the same chapter giving the City the right to "pass and enforce all necessary police ordinances," and under Clause 75 of the same chapter giving the City the right to declare what shall be a nuisance and to abate the same and to impose fines upon parties who make or create, continue or suffer nuisances to exist."

By virtue of the above you can readily see that the powers of the City to regulate such places as the Consolidated Fireworks Factory are very broad and the City Council has the right to pass additional ordinances, subject, however, to the limitation that such ordinances must be reasonable, the reasonableness or unreasonableness of the ordinances being a question depending upon all the facts and circumstances of the case; and in this connection we beg to state that it has been especially held with reference to Clause 75, giving municipalities the right to declare what shall be a nuisance, that a delegation of power to the City to say what is a nuisance does not authorize the Council to arbitrarily declare that a nuisance which is not such in fact; and that ordinances passed in pursuance of this power are subject to the rule that the ordinances must be reasonable; and that this question can only be finally determined by the Courts.

McQuillan Municipal Ordinances, Secs. 441-442 (citing a large number of cases including *Yates v. Milwaukee*, 77 U. S. 497, and a number of Illinois cases).

Respectfully submitted,

MAX M. KORSHAK,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 15, 1911.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

With reference to the right of the Chicago and Oak Park Elevated Railroad Company to occupy Market street between Lake street and Madison street with an elevated railroad, we beg to advise you as follows:

The three ordinances affecting this question appear in the order of their date.

On May 15, 1893, an ordinance was passed by the City granting permission and authority to the Lake Street Elevated Railroad Company, by which name the present Chicago and Oak Park Elevated Railroad Company was then known, to construct, maintain and operate an elevated road and branches in the City of Chicago. Clause 2 of said ordinance is as follows:

“Also a branch line beginning on the main line of road at Market street and Lake street, running thence in a southerly direction along Market street to the south line of Madison street; provided, said line of road on Market street shall not occupy with its posts more than 22 feet of said street on such part of said street as may be designated by the Mayor and Commissioner of Public Works, and accepted by said railroad company, and no more than two main tracks shall be laid upon said Market street, and provided, in leaving its main line of road upon Lake street, it may make the necessary curves to build the line of road hereby authorized upon Market street.”

Section 5 of said ordinance is in part as follows:

“The rights, powers and privileges hereby granted are upon the express condition that all freight trains and other rolling stock of surface steam railroads, shall

be absolutely excluded from said elevated railroad, its tracks and right of way, and it shall be used for moving its general passenger trains only, and for accommodating and handling passenger traffic and the mails exclusively, *to which end said company shall cause its trains to be regularly and systematically moved at such intervals as shall be necessary to accommodate the public, and the number of such trains and the frequency with which they are moved, shall be increased as rapidly as the demands of the public shall render necessary and the increase of traffic warrant.* * * *

This ordinance was thereafter duly accepted and subsequently, on October 1, 1894, another ordinance was passed by the City Council granting to the Chicago and Oak Park Elevated Railroad Company, therein described as the Lake Street Elevated Railroad Company, permission to construct, maintain and operate a line of road connecting at the east line of Market street extending north with the line of road now constructed and operated by said company on Lake street, thence extending east on Lake street to the east line of Wabash avenue, subject, however, to the provisions of said ordinance contained, among others being clause 5, which is in part as follows:

“All trains operated by said company over its line of road, passing over the Lake street bridge eastwardly, shall at least alternately continue eastwardly over the line of road hereby authorized, and in case said company shall hereafter obtain the right to build, or use a loop line for running its trains, then all its trains proceeding eastwardly over the Lake street bridge, shall continue to proceed eastwardly over the elevated railroad hereby authorized, and no trains of said company shall move eastwardly over the elevated railroad authorized, between Wabash avenue and Market street, except such trains as have proceeded eastwardly over the elevated railroad hereby authorized.”

This ordinance was also duly accepted by the Company.

On June 29, 1896, the City Council granted permission to the Union Consolidated Elevated Railroad Company to construct what was known as the “Loop”, commencing at Lake street and Fifth avenue, extending thence east to Wabash avenue, thence south on Wabash avenue to Van Buren street,

thence west on Van Buren street to Fifth avenue, thence north on Fifth avenue to Lake street. This ordinance was also duly accepted, and by an arrangement between the Chicago and Oak Park Elevated Railroad Company and the Union Consolidated Elevated Railroad Company the former company was permitted to use the aforesaid loop, and thereafter did so, and in so doing ran its cars eastwardly over the Lake street bridge to Wabash avenue, at which time it ceased to use the spur on Market street extending from Lake to Madison street, and said Market street spur was unused by said Chicago and Oak Park Elevated Railroad Company until about the 13th day of July, A. D. 1908, when the City Council passed an order (Council Proceedings 1908-1909, page 1168), which was in words and figures following:

“Whereas, a great many complaints have been received as to the service now being rendered by the Chicago & Oak Park Elevated Railroad Company; and

Whereas, said Railroad Company has expressed its willingness to put into operation at least five additional trains each day, but represents that it is unable to operate such additional trains owing to the lack of adequate ‘loop’ facilities; and

Whereas, said Railroad Company can operate such additional trains, if permitted to use the present Market street station as its terminal, for such additional trains; and

Whereas, the City of Chicago is willing that the said railroad company may use said Market street terminal for such additional trains, under certain terms and conditions; now therefore, it is

Ordered, That the Chicago and Oak Park Elevated Railroad Company may be permitted and permission and authority are hereby granted to operate not less than five additional trains daily between its terminal station at Austin avenue and its terminal station at Market street without having such trains traverse the ‘loop’; provided, however, that all of said trains shall bear a readily legible sign, approved by the Commissioner of Public Works, definitely indicating that said trains do not traverse the ‘loop’; and provided, further, that the number of cars to be operated by the said company around said ‘loop’ shall not be less than the present number of cars now operated by said company around said ‘loop’

so long as said company avails itself of the permission and authority hereby granted.

It is expressly understood and agreed, however, and the acceptance by the railroad company of the privileges granted in this order shall be considered as an acceptance with the express understanding and agreement that the passage of this order shall not at any time or in any way or in any proceeding whether at law or in equity, be considered or taken as a waiver by the City of Chicago of any right or rights whatsoever, or as a recognition of the validity of any of the ordinances of said railroad company or of any portion of any of said ordinances under and by virtue of which said Chicago and Oak Park Elevated Railroad Company now claims to operate any line of railroad, either surface or elevated, in said City of Chicago, and that the grant of permission and authority herein contained is a mere temporary measure and made for the sole purpose of, and shall have the sole effect of, facilitating the transportation of patrons of said railroad company, and may be revoked, cancelled and annulled at any time in the discretion of the Mayor or the City Council."

It does not admit of dispute that the Chicago and Oak Park Elevated Railroad Company was not, after the construction of the loop, authorized to operate any car or train of cars passing either to or from the Market street spur across the Lake street bridge, unless such car or train of cars also traversed the loop hereinbefore referred to. The only remaining use then to which the Market street spur could be devoted would be that of a branch connecting with the main line at a point east of the river and outside of the loop.

The fact that the Chicago and Oak Park Elevated Railroad Company has not seen fit at any time to operate on Market street in either of the methods last above referred to, would seem to be fairly strong evidence that either of said methods of operation was impracticable, and if such is the case said Market street branch would serve no useful purpose either to the Chicago and Oak Park Elevated Railroad Company or that portion of the public residing in the City of Chicago having occasion to patronize said Chicago and Oak Park Elevated Railroad Company's line of road. If such were to be determined to be the case the Chicago and Oak Park

Elevated Railroad Company would not have any right outside of the order of July 13, 1908, to occupy the portion of Market street involved in this opinion with its tracks, and said tracks would, therefore, constitute a useless obstruction to that portion of Market street occupied by them, which would properly be deemed a nuisance and be abatable as such.

It will be noted that Section 5 of the ordinance of May 15, 1893, requires the Chicago and Oak Park Elevated Railroad Company to cause its trains to be regularly and systematically moved at such intervals as shall be necessary to accommodate the public, and the number of such trains and the frequency with which they are moved shall be increased as rapidly as the demands of the public shall render necessary and the increase of traffic warrant. We think that the operation of trains in accordance with this provision is a condition subsequent and that a failure to comply therewith might be made the basis upon which to predicate a termination of all of the rights conferred by the ordinance.

It will be noted that the ordinance does not, by its terms, confer upon the City the right to terminate the grant upon a non-compliance with these conditions subsequent, but, nevertheless, if such conditions are vital to the Company's license to use the street, a court will, on proper application, determine that the Company has no right to further occupy the street with its elevated structure.

. *City of Belleville v. Citizens Horse Railway Co.*, 152 Ill. 171.

People v. Central Union Telephone Co., 232 Ill. 260.

From these cases it would seem that the city might indicate its election to terminate the grant to the Company by passing an ordinance to that effect, but it also seems that the City will have to follow said ordinance by some proper proceeding in a court of law to terminate the Company's rights in the street, and in this case such proceeding should be in the nature of a *quo warranto*.

Except for the operation of the Market street line under and by virtue of the order of July 13, 1908, the Chicago and Oak Park Elevated Railroad Company has not operated this line since the construction of the loop, hereinbefore re-

ferred to, which, as will be noted, is about fifteen years. This, we believe under the circumstances, amounts to an abandonment of the grant under which the Market street line was constructed.

In *Henderson v. Central Passenger Railway*, 21 Fed. 359, the court held that a non-user of ten years constituted an abandonment.

In *Louisville Trust Co. v. City*, 76 Fed. 296, the court held that a non-user of twenty years constituted an abandonment.

In *State v. East Fifth Street Railroad Company*, 38 L. R. A. 218 (140 Mo. 539), the court held that a non-user of three years worked a forfeiture of the grant.

In *Gerard College Passenger Railroad Company v. The 13th and 15th Streets, etc.*, 7 Phil. Rep. 620, the court held that a non-user of 11 years constituted an abandonment.

We are, therefore, of the opinion that the City has a right to have the elevated structure in question removed from that portion of Market street lying between Lake street and Madison street, and that if it is the desire of the administration so to do, the City Council should pass an order terminating the rights conferred by the order of July 13, 1908, should pass an ordinance repealing that portion of the ordinance giving to the Chicago and Oak Park Elevated Railroad Company the right to occupy said portion of Market street aforesaid, and should direct this department to proceed to institute quo warranto proceedings to oust said Chicago and Oak Park Elevated Railroad Company from that portion of Market street involved in this opinion.

Very truly yours,

CHAS. M. HAFT,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

CHICAGO, NOVEMBER 15, 1911.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

The letter of H. V. McGurran, Superintendent of the Bureau of Compensation, approved by you, asking whether

authority is conferred by Section 2302A of the Revised Code of 1911, as passed by the City Council October 30, 1911, at page 1394, to issue permits for the construction of vaults under the surface of an alley, and also as to whether the fee in the alley in the rear of Lot 37, Block 125, of the School Section Addition to Chicago is in the abutting property owners, has been referred to me.

Under a line of decisions handed down by the Illinois Supreme Court on October 28, 1910, in which rehearings were denied on December 9, 1910, the fee to the streets and alleys in the School Section Addition to Chicago is held to be in the abutting property owners.

Farwell v. City of Chicago, 247 Ill. 235;

N. W. Trust Co. v. City of Chicago, 247 Ill. 238;

Illinois T. & S. Bank v. City of Chicago, 247 Ill. 264;

Tacoma Safety Deposit Co. v. City of Chicago, 247 Ill. 192;

Sears v. City of Chicago, 247 Ill. 204.

I find, however, that subsequent to the platting of the School Section Addition, a Subdivision of Blocks 125 and 136 was made on December 7, 1846, by Alexander Brand, which was recorded December 8, 1846, in Book H, page 372 (New Vol. H of Maps, page 147). The certificate to this plat was made by Asa F. Bradley, City Surveyor. This dedication was made under the law of 1845 which required that the plat be certified to by the County Surveyor, and the Supreme Court has held in the case of the *Village of Vermont v. Miller*, 161 Ill. 210, that a certificate by any Surveyor other than the County Surveyor, even if appointed by the city, is not in compliance with the statute.

Under the decisions in 247 Illinois above cited, this dedication must therefore be held to be a common law dedication, and the fee of the streets and alleys in this Subdivision as well as in the School Section Addition in general, remains in the abutting property owners.

In regard to issuing a permit for a vault under an alley, I would advise you that although Section 2300 of the Chicago Code of 1911, prohibits the granting of vault space under roadways, the ordinance of October 30, 1911, which is Section

2302A, makes no distinction in this regard in cases where the fee is in the abutting property owners, and under the Supreme Court decisions in 247 Illinois, cited above, it would seem that such a permit should be granted where the abutting property owner is the owner of the fee.

I would, therefore, advise you that a permit may be issued for vault space under an alley in which the abutting property owners hold the fee, even though such alley be merely a roadway, and that the fee to the alley above described is in the abutting proper owners.

I am returning herewith the Abstract of Title No. 680,566, which you submitted with your letter.

Yours respectfully,

S. CRAWFORD ROSS,
Assistant Corporation Counsel.

Approved.

WILLIAM H. SEXTON,
Corporation Counsel.

NOVEMBER 15, 1911.

TO THE HONORABLE, THE BOARD OF TRUSTEES OF THE POLICE
PENSION FUND OF THE CITY OF CHICAGO.

Gentlemen:

In the matter of the application of Bridget Burke, widow of Patrick Burke, who was appointed as a patrol wagon driver October 26, 1897, and appointed patrolman August 15, 1907, I beg to say that deceased served as such patrol wagon driver 9 years 10 months and 9 days—as patrolman 3 years and 5 months.

It has been repeatedly held by the legal advisers of the Police Pension Board, as the opinions on file will disclose, that patrol wagon drivers, as such, do not come within the purview of the pension law. The length of service of the deceased, Patrick Burke, as patrolman was only 3 years and 5 months. He died from organic heart disease, according to the Coroner's certificate, which does not appear to have been induced by his service as such patrolman.

As his widow's claim for a pension can be based solely upon his service as a patrolman and the length of service in

such position is only 3 years and 5 months, there is no warrant under the law for paying this widow a pension, in view of the fact that his services as a patrol wagon driver of 9 years and 10 months can not be included in his total service.

Very truly yours,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,
Corporation Counsel.

NOVEMBER 15, 1911.

TO THE HONORABLE, THE BOARD OF TRUSTEES OF THE POLICE
PENSION FUND OF THE CITY OF CHICAGO.

Gentlemen:

The cause of the death of this officer is given as spinal myelitis or inflammation of the spinal cord. His length of service was 10 years 7 months and 15 days.

According to a notation on the original pension petition he was granted a pension of \$50.00 April 1, 1901, apparently for injuries incapacitating him from police duty, which were received through slipping and falling on an icy sidewalk on the way to the 16th precinct station on Wentworth avenue near 65th street at 5:30 o'clock December 24, 1898. The officer received this pension up to the date of his death, September 9, 1911, and the widow now asks for a transfer of the pension to herself.

Section 6 of the Pension Act, Hurd's Revised Statutes 1909, page 423, provides in part that:

"Whenever any member of the police force shall die after ten years' service therein and while still in the service of such city * * *."

his widow shall receive a pension. As the decedent was not in the service when he died his widow can not obtain a pension under this clause.

Section 6 also provides that:

"Whenever any member of the police force * * * shall lose his life, while in the performance of his duty, or receive injuries from which he shall thereafter die" his widow shall receive a pension. If the death of the hus-

band of the applicant was occasioned by the injuries received while in the performance of his duty, she is entitled to a pension, otherwise not.

The certificate of the physician of the Board states that the death of the sergeant was not the result of his previous injuries. In view of this medical finding by the Board's physician, and which I must accept as correct, the Board must necessarily find that the husband of the applicant died from natural causes and not from injuries received while in the performance of duty. Consequently the law makes no provision for a pension to her.

Respectfully yours,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 17, 1911.

HON. CHARLES E. READING, Chairman, Committee on Compensation.

Dear Sir:

You forwarded to this department several drafts of an ordinance providing for the vacation of certain alleys adjoining and intersecting the plant of the Schoenhofen Brewing Company, attached to which was a copy of an opinion concerning one of the alleys in question, and you ask to be advised in the matter.

Your communication, together with the drafts above mentioned and plats of the property affected, were turned over to me for consideration and reply.

You state in your letter that the beneficiaries of the ordinance claim that the North and South alley in the block bounded by West 16th street, Seward street, West 18th street and Burlington street, is a private alley. The opinion mentioned above holds the same way.

You first inquire whether the copy of the opinion submitted is authentic and correct. The copy in question is an authentic transcript of an opinion written by George M.

Bagby, Esq., Assistant Corporation Counsel, under date of March 20, 1911, same being approved by Edward J. Brundage, Esq., Corporation Counsel.

So far as the correctness of this opinion is concerned, I am unable to agree with the conclusions reached by the writer of same as to a part of the alley which he has conceded to be a private alley. He states the law correctly, but only about half of the alley is affected by the conditional dedication which he speaks of.

All of the property shown on the plat attached to the ordinance is a part of the original Block 44 in the Canal Trustees' Subdivision of the west half and that part of the southeast quarter lying west of the Chicago river in Section 21, Township 39 North, Range 14 East of the Third Principal Meridian. This block was originally divided into four sub-lots, numbered 1, 2, 3 and 4, respectively. Sub-lot 1 was re-subdivided by John F. Irwin, and platted as John F. Irwin's Subdivision, and that portion of the alley in question extending alongside of lots 37 to 46 was dedicated as a public alley and so shown on this plat, which was recorded August 24, 1864, in Book 162 of Maps. p. 67.

There was no condition or reservation of any kind attached to this dedication. The intention of the owner to dedicate was clearly shown, all the formalities of a statutory dedication were complied with, and the alley was accepted and used as a public alley for nearly half a century. Consequently there can be no question about this portion of the alley being City property.

The Southern half of the alley in question was platted as a portion of Artemus Carter's Subdivision of sub-lot 4, which was acknowledged by the owner and filed for record, January 24, 1856, in Book 98 of Records, p. 57. On this plat, that portion of the alley which is opposite lots 29 to 40 of said subdivision of sub-lot 4, this being only about half of the alley in question, was marked "Private alley, to become public when Lot 3 gives same width."

Sub-lot 3 was afterwards subdivided and is now known as Hull & Clark's Subdivision. The surveyor's certificate is dated June 20, 1865, and the plat was recorded October 14,

1865, in Book 163 of Maps, p. 138. No additional alley is dedicated. The condition named in order to make the portion of the alley in Carter's Subdivision a public alley was therefore not complied with.

While all these matters are ante-fire records, there is no doubt as to their correctness. I took occasion to verify them by examining the records of the Chicago Title & Trust Co.

It is more difficult to determine whether after the opening up of the Subdivision of Sub-lot 3 anything else was done by Carter which amounted to a waiver of the condition, or whether the city expended money in adapting the same public use.

The rule in such cases, as stated by Dillon on Mun. Corp., 5th Ed., Sec. 1075, is as follows:

"The right of the owner to enforce the condition may be *waived* by permitting the municipality to expend money in adapting the lands to public use in a manner inconsistent with the condition."

I can find nothing which indicates that the City has taken action of the kind mentioned,—in fact it is stoutly insisted that there never was anything done on the alley by the city, although it is admitted that the public used the alley during the 56 years that have elapsed since the plat of the subdivision was recorded, such use being a permissive use only.

There being nothing to show that the condition named was waived, the Southern half of the alley must be regarded as a private alley, since in such a case the dedication must take effect according to its terms or not at all.

Dillon on Mun. Corp., *supra*.

St. Louis v. Meier, 77 Mo. 13.

Your next question is whether the City Council has any authority to pass an ordinance for the vacation of a private alley, and also whether the City would in any way be liable for damages in the event that the City Council should pass such an ordinance.

The vacation of a private alley by the City would be without legal effect, since the City has no right to interfere with private rights of this kind. It would serve no useful

purpose, so far as the rights of the owners are concerned. The City having no right to do so, it would be absurd for the City Council to pass such an ordinance.

So far as the City's liability for damages is concerned, in case an ordinance closing a private alley was passed, there could be no liability if closed for the benefit of the owners of the adjacent property unless the courts later declared that the alley when vacated was in fact a public alley. In that event the City would be liable for damages if special damage resulted to an owner of property in that block.

Persons whose property adjoins a public way that is vacated, or whose property is affected so far as ingress and egress to same is concerned, can recover damages. All other property owners, no matter how much they may be inconvenienced, suffer the same kind of damage as the public at large, although it may be greater in degree.

City of E. St. Louis v. O'Flynn, 119 Ill. 200;

City of Chicago v. Baker, 86 Fed. 755; 30 C. C. A. 364.

Consequently if the party for whose benefit an alley is being dedicated owns all the property in the block, there can be no damage for which a recovery can be had against the City.

There being no reason for action with regard to the portion of the alley that is private, however, there seems to be no occasion for including that within the provisions of the ordinance you have under consideration.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,

Corporation Counsel.

NOVEMBER 17, 1911.

HON. L. E. McCANN, Commissioner of Public Works.

Dear Sir:

Under date of August 19, 1911, John D. Riley, Superintendent of Maps, requested of this department an opinion as

to the effectiveness of two vacation instruments and attached to his request copies of said instruments, and a plat of the premises affected.

We have made a very careful examination and search of the records in the Recorder's Office of Cook County in an endeavor to learn the history of the premises in question. We have caused the Map Department to make a copy of plat of the subdivision, the Sewer Department to indicate what sewers have been laid therein and the City Electrician what lamp-posts have been erected therein. The result is contained on the sketch which we attach hereto.

It is possible litigation may arise affecting these premises and we would suggest that this sketch be filed away with this opinion so that future reference to the same may be had.

We find that in 1870 Frederick M. Jones, Maria Jones, James Jones and Robert Jones were the owners of the west one-half ($\frac{1}{2}$) of section twenty-nine (29), township thirty-eight (38) north, range fourteen (14).

On July 9, 1870, Samuel S. Greeley, surveyor, certifies that he surveyed the premises and subdivided the same into "lots and blocks" and that the same are correct as represented on the plat.

On August 3, 1870, John Mattocks, the attorney in fact of Frederick M. Jones, Maria Jones, James Jones and Robert Jones, personally appeared before Calvin De Wolf, Justice of the Peace, and acknowledged that at the time of such appearance Frederick M. Jones, Maria Jones, James Jones and Robert Jones were the owners of this subdivision and that the said Frederick M. Jones, Maria Jones and Robert Jones caused said lands to be so subdivided.

On September 13, 1870, the plat was approved by the Board of Trustees of the Town of Lake.

On September 29, 1870, the plat was filed for record as Document No. 67718. On said plat of subdivision appears the following: "*Note: Areas of blocks as marked hereon include the surrounding half streets.*"

The records in the Recorder's office further show that in January, 1891, Samuel M. Church, Alfred B. Church and

David B. Sherwood were the owners of block nineteen (19) in said subdivision.

On January 31, 1891, J. C. Elder, surveyor, certifies that he surveyed block nineteen (19) and sub-divided the same and that the plat correctly represents the subdivision and that all dimensions are in feet or decimals of a foot.

On February 9, 1891, Samuel M. Church personally appeared before Abram J. Miller, a notary public, and acknowledged that he was the owner of block nineteen (19) jointly with David B. Sherwood and Alfred B. Church.

On February 9, 1891, Samuel M. Church, Alfred B. Church and Alfred B. Sherwood signed the plat.

On February 14, 1891, H. J. Jones, examiner of subdivisions, approved the plat.

On September 23, 1891, the plat was filed for record as Document No. 1540324. This subdivision is known as "J. R. Lane's subdivision of block nineteen (19) in the subdivision of the west one-half ($\frac{1}{2}$) of section twenty-nine (29), township thirty-eight (38) north, range fourteen (14)."

Prior to January 31, 1891, the whole of block nineteen (19) was sold with reference to the plat of September 29, 1870.

On September 1, 1891 (after the survey was made and the plat signed and approved, but before being recorded) Herbert L. Bailey obtained title by separate conveyances as to each of the lots in block nineteen (19). These lots were sold with reference to the plat filed September 23, 1891.

On November 5, 1891, Bailey conveyed to Lane with reference to the plat.

On March 19, 1895, Lane conveyed by warranty deed to Samuel M. Church with reference to the plat by separate conveyances as to each lot, lots nine (9) to twenty-four (24) and thirty-five (35) to forty-eight (48) and also conveyed to David B. Sherwood in the same manner lots one (1) to eight (8) and twenty-five (25) to thirty-four (34).

On April 25, 1901, recorded October 24, 1901, Samuel M. Church and David B. Sherwood vacated the plat filed on September 23, 1891. (One of the vacation instruments in question.)

On May 29, 1911, William J. Gilbert obtained title by warranty deed, recorded July 24, 1911, Document No. 4798845 to all of block nineteen (19).

On June 17, 1911, acknowledged July 22, 1911, and recorded July 24, 1911, Document No. 4798844, Alfred B. Church, individually, Jessie E. Sherwood and Clark H. Eno, as executors and trustees under the will of David B. Sherwood, deceased, vacated the south thirty-three (33) feet of Seventy-fifth street, three hundred and fifty-eight (358) feet east and west immediately north of and adjoining said block nineteen (19). (One of the vacation instruments in question.)

On July 5, 1881, and accepted July 15, 1881, an ordinance was passed by the Board of Trustees of the Town of Lake, granting to the Chicago & Western Indiana (Belt) Railway Company the right of way for railroad tracks along the north side of Seventy-fifth street, the vacation of which street is here in question.

THE VACATION INSTRUMENT OF JUNE 17, 1911, IS INEFFECTIVE.

It is our opinion that the filing of the plat on September 29, 1870, constituted a statutory dedication of Jones' subdivision of the west one-half ($\frac{1}{2}$) of section twenty-nine (29), township thirty-eight (38) north, range fourteen (14), and that all the streets appearing in the whole of said subdivision were so dedicated. The note on said plat expressly includes the surrounding half streets.

An acceptance of a dedication may be shown in a great variety of ways, the more usual are ditching, grading, repairing, curbing, paving, laying sidewalks, sewers, drains, water pipes or water mains or the erection of lamp-posts, or the exercise of jurisdiction through an order of the municipal officers. That which constitutes an acceptance is as varied as the conditions and circumstances surrounding the land dedicated. *It is always a question of fact.*

It appears from the sketch hereto attached that in Ashland avenue, appearing in the subdivision, water pipes were laid in 1890, 1898 and 1902, and sewers were laid in 1890; that along Seventy-ninth street sewers were laid in 1906 and

1911 and water pipes were laid in 1908, 1909 and 1910; that along Seventy-fourth street sewers were laid in 1910 and water pipes were laid in 1909, 1910 and 1911; that along Seventy-third place sewers were laid in 1907, 1909 and 1910; that along Seventy-second street sewers were laid in 1903; that along Baker street (Seventy-first place), sewers were laid in 1903; that along Seventy-first street sewers were laid in 1898 and 1900 and water pipes laid in 1903; that along Ada street sewers and water pipes were laid in 1909; that along Center avenue sewers were laid in 1909 and water pipes in 1908. On all of these streets as appears from the sketch attached hereto, were erected lamp-posts, electric and gasoline.

It follows, therefore, that the City improved almost all of the streets appearing in said subdivision. Some of the streets were improved as early as 1890; other streets were improved from time to time up to the present year.

The passing of an ordinance granting to the Chicago & Western Indiana (Belt) Railway Company was a recognition of the authorities of the Town of Lake of the existence of Seventy-fifth street.

It is our opinion that the passing of this ordinance is evidence of an acceptance of Seventy-fifth street on the part of the Board of Trustees of the Town of Lake and that the improvements made by the City of Chicago in almost all the streets appearing in the subdivision is evidence of an acceptance on the part of the City of Chicago, sufficient, at least, to estop the owners of block nineteen (19) from effectively vacating a portion of the plat showing the south thirty-three (33) feet of Seventy-fifth street adjoining said block nineteen (19).

An acceptance by a municipality of some of the streets and alleys appearing on the plat is an acceptance of all the streets and alleys *unless an intention to limit the acceptance is shown*.

Village of Lee v. Harris, 206 Ill. 428.

Village of Augusta v. Tyner, 197 Ill. 242.

The City is the sole judge as to the public necessity of opening streets and alleys and it may do so as its resources allow and public necessity requires.

Village of Lee v. Harris, supra.

We know of no intention on the part of the Trustees of the Town of Lake or the authorities of the City of Chicago by any act or otherwise to limit the acceptance of the dedication of the streets and alleys appearing in this subdivision.

The instrument purporting to vacate a portion of the plat showing the south thirty-three (33) feet of Seventy-fifth street is dated June 17, 1911, and is signed Alfred B. Church (individually), Jessie E. Sherwood and Clark H. Eno, executors and trustees under the will of David B. Sherwood, deceased. On June 17, 1911, these persons were not the owners of the lots in block nineteen (19). On May 29, 1911, about nineteen days previous to the signing of the vacation instrument, Alfred B. Church (individually), Jessie E. Sherwood and Clark H. Eno, executors and trustees under the will of David B. Sherwood, deceased, conveyed title to all of block nineteen (19) by warranty deed to William J. Gilbert. It is true, however, that on July 24th this deed, together with the vacation instrument was filed.

It is our opinion, however, that in the absence of evidence to the contrary the presumption of law is that the deed of May 29, 1911, was delivered on that day and that on said day William J. Gilbert became the owner of all of block nineteen (19). In the case of *L. E. & W. R. R. Co. v. Whitam*, 155 Ill., at page 521 of opinion, the court said:

“The presumption is that the deed was delivered on the day of its date and the fact that the certificate of acknowledgment bears a later date is not sufficient to rebut such presumption.”

The vacation instrument is signed by Jessie E. Sherwood and Clark H. Eno as executors and trustees under the will of David B. Sherwood, deceased. We find no statutory power giving to an executor or trustee the right to vacate a portion of a plat showing public streets or grounds. Unless the will of David B. Sherwood gave to these executors and trustees title in fee simple the statute has not been complied with in the signing of the vacation instrument in question for the reason that it is not signed by the *owner*. The statute provides that only the owner can vacate. We are unable to learn whether the will gave to the executors and trustees the title

in fee simple for the reason that a careful search of the records in the Probate Court of Cook County fails to show that such will was ever filed. In the absence of any power conferred by the will upon the executors and trustees to vacate a portion of the plat showing the south thirty-three (33) feet of Seventy-fifth street, the instrument in question is ineffective.

In view of the abundant evidence of an acceptance of the dedication on the part of the trustees of the Town of Lake and the municipal authorities of the City of Chicago, and in view of the fact that the vacation instrument is signed by persons not the owners of the lots in block-nineteen (19) on the date of its execution, and in the absence of a showing that the executors and Trustees had the power to vacate, we must hold that this instrument is ineffective as vacating a portion of the plat showing the south thirty-three (33) feet of Seventy-fifth street adjoining block nineteen (19).

THE VACATION INSTRUMENT OF APRIL 25, 1901, IS INEFFECTIVE.

This instrument purports to vacate that portion of the plat showing the alley in block nineteen (19) running from Seventy-fifth street to Seventy-sixth street. This alley was dedicated in 1891. The Town of Lake became a part of the City of Chicago in July, 1889. From 1891 until 1901, the date of the instrument in question, the City of Chicago improved a number of the streets appearing in the subdivision which should constitute an acceptance. It being the law that an acceptance of some of the streets and alleys appearing in a subdivision is an acceptance of all the streets and alleys as held in *Village of Lee v. Harris, supra*, we are of the opinion that this alley was accepted by the City.

There were several different conveyances of the lots in block nineteen (19) subsequent to 1891 and prior to 1901. The sales of these lots were as to each separate lot and were made with reference to the plat.

In *Mendal v. Whiting*, 142 Ill. 348, our Supreme Court held that:

“The description of lots in a designated block of a subdivision makes the plat a part of the deed and the

purchaser is restricted to the boundaries of the lot shown by the plat."

The boundaries of the lot shown by the plat of 1891 do not include the alley in question.

In our opinion the filing of this plat was a statutory dedication of this alley and we believe there has been an acceptance of the same on the part of the municipal authorities of the City. The fact (if such is a fact), that the alley has been seldom used, does not tend to show that it is not a public alley.

Village of Lee v. Harris, supra.

If the alley has been in use there has been an acceptance of the dedication of it. If there has been no express acceptance of the alley, the City was entitled to a reasonable time in which to accept. In view of what we believe to be the law affecting this instrument, and in view of the improvements made in the subdivision as a whole, it can hardly be argued with much effect that there has been no acceptance of this alley. It is seldom that an alley itself is improved by paving or otherwise. It is a matter of common knowledge that almost all the public alleys of the City are not improved.

It is our opinion, therefore, that this instrument is ineffective as vacating a portion of the plat showing the alley in question.

We are returning, herewith, copies of the two vacation instruments in question and plat of block nineteen (19).

Very truly yours,

HENRY A. BERGER,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

NOVEMBER 20, 1911.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Your communication dated November 11, 1911, transmitting petition protesting against the establishment of a five cent theater on Lawrence avenue near the corner of Robey street, has been referred to me for attention. In this commu-

nication you request an opinion as to whether you can refuse a license for the theater on the showing made in the petition.

This petition is signed by a large number of residents in the immediate vicinity of the proposed theater, including the Rev. George B. Nelson, pastor of the Swedish Mission Church, and the Rev. C. R. Stevenson of the Fifth United Presbyterian Church, who object to the location of the five cent theater for the reason that it is located only one block from a church and one and one-half blocks from a public school.

Section 117 of the Chicago Code of 1911 makes it unlawful for any of the twenty-one classes of entertainments provided by our ordinances to be presented within 200 feet of any hospital, church or building used exclusively for residence purposes. Our information is that the theater is not within 200 feet of any church or building used exclusively for educational purposes.

Section 1515, Chapter XLI of the Chicago Code of 1911, provides as follows:

“Mayor to exercise discretionary power. In all cases where it is not otherwise expressly provided, the mayor shall have power to hear and grant applications for licenses upon the terms specified by this ordinance; and all licenses shall be issued to such person or persons as shall comply in all respects with the provisions of this ordinance and as the mayor in his discretion shall deem suitable and proper persons to be licensed.”

Under Sections 1515, 1512 and 109 of The Chicago Code of 1911 you are given discretionary powers with reference to the issuance of amusement licenses; and while it may be contended that under this ordinance broad judicial powers are vested in you, yet ordinances of this kind have generally been upheld whenever the discretion has been reasonably and not arbitrarily exercised.

Swift v. People ex rel Powers, 63 Ill. App. 453.

Harrison ex rel Yaeger v. People, 101 Ill. App. 224.

Meyers v. City of Decatur, 143 Ill. App. 103.

Dunne v. Kretzman, 130 Ill. App. 469, (Affirmed in 228 Ill. 31).

Harrison v. People ex rel Raben, 222 Ill. 150.

Block v. City of Chicago, 239 Ill. 251.

Dillon on Municipal Corporations, 597. (Vol. 2.)

The question in the present case is, therefore, whether your refusal to issue a license to the proposed five cent theater, because of its proximity to a church and school and because of the protest of a large number of the residents in the neighborhood adjacent to its location, would be a reasonable exercise of discretion.

What is, or is not a reasonable discretion must, of course, depend upon the facts of each particular case, and the courts have generally given a very wide latitude to this discretion, especially whenever exercised with relation to the location of saloons.

Harrison v. People, supra. (Both cases).

Swift v. People, supra.

Dunne v. Kretzman, supra.

Courts have also held that the refusal of the Mayor to issue a license to a bowling alley in a purely residence district was not an unreasonable exercise of discretion.

Harrison v. People, 101 Ill. 225.

The question with reference to discretionary powers of municipal officers in matters involving moving picture theaters was discussed in the case of *Block v. City of Chicago*, 239 Ill. page 251. While it is true that the discretion exercised involved the censorship by the Chief of Police of moving picture films, and did not involve the question of location, yet the court strongly upheld the reasonable exercise of discretion. The court said:

“Government could not be carried on if nothing could be left to the judgment and discretion of the administrative officers.”

Fortunately, however, our courts have recently passed on a case almost identical to the case in question. This opinion was filed May 31, 1911, in *People ex rel, United Theater Company v. Fred A. Busse, et al.*, Gen. No. 15461, Term No. 296. It was contended by the City that the theater was not in a “fit and proper place,” as required by ordinance, by reason of its proximity to St. Rose of Lima’s church, which was located within 118 feet on the same side of the street. The pastor of this church protested in writing against the establishment of the amusement and the Mayor, believing he was conserving

the best interests of the City, refused to grant the license. The contention of the amusement company was that the Mayor was not justified in refusing to grant a license for a place of amusement on account of its nearness to a church because the words "*fit and proper*" (which are the words used in our present ordinance) referred to the inherent character and condition of the place in which the amusement was held, and not to its location. The court in this case, after discussing the case of the *People v. Busse*, 240 Ill. 338, involving the question of the location of junk shops, said:

"The Supreme Court has also recently held that the business of conducting a theater is a private business and that 'in respect of the power of the legislature to tax or license it, the business of conducting a theater is in no different condition from any other business. The legislature may impose a tax upon, or require a license fee, for the exercise of any avocation. The legislature has the same authority over a theatrical business as over any other private business and no more.' (*Steele v. People*, 231 Ill. 340, 344.)

However commendable the purpose of the Mayor may have been in attempting to prevent the location of this place of amusement in such close proximity to a church long established, we cannot construe the language of the ordinance in such a manner as to effectuate this purpose of the Mayor, without violating the law, as laid down by our Supreme Court."

Were it not for this decision we would say that the protest of the residents in the neighborhood where it is proposed to locate the theater, the character of the neighborhood and the proximity of the theater to churches and schools are not proper matters for the consideration of this department, but are matters which are to be considered by you in the exercise of your sound discretion. But in view of this very recent decision, we are of the opinion that the showing made in the petition hereto attached would be considered insufficient by the courts, and that your refusal to issue a license would not be sustained.

Respectfully submitted,
MAX M. KORSHAK,
Assistant Corporation Counsel.

Approved:
WILLIAM H. SEXTON,
Corporation Counsel.

NOVEMBER 20, 1911.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

The letter of H. L. Lucas, Superintendent of Water Pipe Extension, in the matter of laying a water main in Everett avenue, south of 54th street, has been referred to me for reply.

This matter comes up upon the application of Thomas A. Collins and John L. Mahoney, who are co-owners of that portion of Block 36 of Hyde Park which lies South of 54th street and East of a 16 ft. alley and has a frontage of 510.7 ft. as shown by plat or sketch hereto attached. The distance between 54th street and 56th street is 996.46 ft. according to measurements shown on said plat. Everett avenue extends North from 55th street only 485.76 ft. which is near the middle of the block. North of this no street has been dedicated nor opened. The proposed water pipe extension is intended to supply a number of apartment buildings which front East toward the lake, between the North end of Everett avenue and 54th street. These lots are numbered from 1 to 9 inclusive in the East $\frac{1}{2}$ of said Block 36, the tenth lot having no number as appears from the said plat hereto annexed.

I beg to call attention to the following facts:

On May 19, 1910, suit General No. 279,411 in the Superior Court of Cook County, Illinois, was filed by William H. Stead, Attorney General, and John E. W. Wayman, State's Attorney for Cook County, for and on behalf of the people of the State of Illinois. The subject matter of this suit embraces all of the land lying East of an irregular shore line in accordance with a survey made June 10, 1879, which line is shown on plat hereto attached. The land lying West of this line is not in dispute, Messrs. Collins and Mahoney own the land from the shore line of June 10, 1879, West to the said 16 ft. alley and claim to own all of the land East of this line to the water's edge. A fence and a gate have been maintained at the North end of Everett avenue which coincides with the North line of Lot 18 of Block 1 of East End Subdivision as shown on said plat. During the summer of 1911 Mr. Collins made a lease of the irregular tract of land fronting on the water to a club in the neighborhood for bathing beach pur-

poses, and a wire fence was erected which shut out the general public from the lake front at that point. Vigorous complaints were made by citizens and this fence was torn down by order of the police department.

At a later date during the building operations of Messrs. Collins and Mahoney, earth excavated from the lots in the East half of Block 36 was carried East and dumped upon a portion of the strip in dispute, as indicated by the blue shading East of the survey line of June 10, 1879. Complaints were again made and this dumping was stopped after orders had been transmitted through the police department.

Mr. Collins has today informed the writer that all earth that was dumped East of the survey line of June 10, 1879, has been drawn back West of that line. The gate and fence, however, at the North end of Everett avenue are still maintained and there has been and still is serious complaint from time to time by persons living South of this gate on Everett avenue, that their access North to 54th street is shut off and that they are compelled to go around by way of 55th street and East End avenue. I am informed that a sewer has already been laid in front of the buildings recently erected by Messrs. Collins and Mahoney. Permit for said sewer was not referred to this department.

Messrs. Collins and Mahoney now tender to the City an easement permitting the City to lay an extension of its water pipe in front of their new buildings, which space would be included in Everett avenue, if the same were extended North from its present terminus to 54th street, but in the instrument by which they tender this easement they expressly stipulate that no other right or privilege shall accrue to the City of Chicago by virtue of the same.

In view of the facts above recited I recommend that the City of Chicago do not accept the said easement tendered by Messrs. Collins and Mahoney, and that permit be not issued under the same, but instead thereof I recommend that Messrs. Collins and Mahoney be requested to make application to the Commissioner of Public Works for a permit to install a private water supply pipe in accordance with the provisions of Section 2740 of The Chicago Code of 1911, said pipe to be laid

in front of the aforesaid apartment buildings from 54th street South to the North end of Everett avenue as now laid out, and I further recommend that said permit shall be made subject, however, to the following condition, which shall be incorporated into and made a part of the same, to-wit:

“It is hereby expressly agreed and understood that no advantage shall be taken by said Thomas A. Collins and John L. Mahoney, by reason of the issuance and acceptance of this permit, or anything done thereunder, and the issuance and acceptance of said permit shall in no manner be construed in prejudice of or as a waiver of the rights of the People of the State of Illinois, the City of Chicago or of said Thomas A. Collins and John L. Mahoney, in a certain suit now pending in the Superior Court of Cook County, Illinois, General No. 279,411, wherein William H. Stead, Attorney General of the State of Illinois, and John E. W. Wayman, State’s Attorney of Cook County, Illinois, in behalf of the People of the State of Illinois, are complainants, and Clara M. Jones is defendant, or in any other litigation involving the title to the lands in question.”

I herewith attach the letter of Mr. Lucas, dated November 16, 1911, the instrument executed by Messrs. Collins and Mahoney by which the aforesaid easement is tendered to the City, and a sketch or plat made by the Map Department, above referred to.

Respectfully submitted,
JAMES G. SKINNER,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 22, 1911.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

I have in hand, for consideration and reply, your letter of recent date transmitting a complaint concerning the sale of what purports to be literature of a salacious character.

The complaint states that at certain places mentioned therein “the vilest kind of immoral literature” is sold in sealed form, and enumerates among those so sold, books with

the following titles: "Only a Boy," "Only a Girl," "The Bride's Confession," "Life in a Harem," "Love Adventures of a Milk-Maid," etc. Obscene books with those titles have been sold surreptitiously for many years, and the titles have become so well-known that the sale of books under such names conveys the impression to the purchaser that he is buying immoral literature.

You state, however, in your letter that you had yourself noticed such displays in windows as are complained of, and had purchases made to learn whether the well-known books of those names were actually being sold, or whether it was a case of the familiar swindle whereby books which are not prohibited by law are sold under such titles; and that you discovered that the places you had investigated were merely palming off the latter on persons who were looking for the indecent and lecherous books known by those titles. You also point out that, while the literature sold is comparatively harmless, it is necessarily a fraud to dispose of it in this manner, and opens up a way by which the purveyor of impure literature can safely market his wares to persons whose repeated visits indicate that they are searching for this class of books and that they can be trusted not to reveal the traffic in same.

You inquire whether the sale of books in the way described above is not in itself an offense for which a person can be punished under the law.

There is no question about the fact that the practice you describe is intended to be and is in fact a fraud on a certain part of the public, although it is probably so carried on that it does not come within the sections of the Criminal Code relating to false pretenses, all of which must be strictly construed.

Section 96 of the Criminal Code provides that whoever, with intent to cheat or defraud another, by any false pretense, obtains money from another, shall be punished. If the words "false pretense" could be interpreted in their literal sense the statute would include the offense described, since the mere sealing of the book without any representation as to the character of the contents is in a certain sense a "false pre-

tense." But the words in law have a more definite technical meaning.

"The word 'pretense' as used in statutes in relation to obtaining property by false pretenses, has not been regarded by the courts in its lexicographic sense, but they have attached to it a legal and technical meaning."

MacKenzie v. State, 11 Ark. 594.

While the words cover a wide range, therefore, there is some limitation to their meaning which has always been recognized by the courts. This limitation has been very aptly expressed as follows:

"To constitute an indictable false pretense there must be at least a direct and positive false assertion as to some existing matter, by which the victim is induced to part with his money or property."

Ranney v. People, 22 N. Y. 416.

The basis for this construction and interpretation of the words on the part of our courts may be gathered from the following excerpt:

"If the expression 'false pretenses' be taken in its most extensive sense, it might at first view be doubted whether a fraud could be committed without a false pretense for falsehood and deceit are the essence of fraud; but the phrase 'false pretenses' has become familiar to the lawyer's ear, and ever since St. 30 Geo. II, c. 24, which made certain frauds upon individuals indictable which were not indictable by the common law, the phrase has acquired a technical character, and has generally been understood as descriptive of such false pretenses as were punishable by that statute, and as would make those frauds indictable which were not so before. *United States v. Watkins* (U. S.), 28 Fed. Cas. 419, 428."

It will be seen from the above that even under the broadest construction of this section of the Criminal Code it would probably be successfully evaded. In fact if any such false pretense as would be indictable were to be made by such a dealer he would immediately render himself liable under the other sections of the criminal laws of the State mentioned below, which could in that event be more successfully invoked than the section relating to false pretenses.

There would be no difficulty about prosecuting offenders

of this kind if the titles mentioned above were in themselves obscene or advertised as obscene literature, or if the titles were of such a distinctive, exclusive or proprietary character that they indicated those salacious books and none other. If such were the case the authorities unquestionably could proceed against persons selling books in the manner described under two different acts of the Legislature.

Section 223 of the Criminal Code makes it an offense to advertise for sale any indecent book of this character; and the Act of 1889 relating to the sale of immoral literature to children also prohibits such an advertisement or offer and would probably apply in most cases. But since the titles of the books in question, however suggestive, do not in themselves convey any indecent meaning except to one who is searching for indecency, and do not necessarily refer to books known to be obscene which have an exclusive claim to such titles, such prosecution could only be limited to the cases where something is done to make it appear that the books sold were obscene. Merely sealing them and selling them as described above in that way is not sufficient to make out a case of advertising an obscene book.

The chances are that any one who is engaged in this business would be cunning enough to avoid making any representations that would render him amenable to any of the statutes mentioned above.

The only recourse, therefore, at present is that clause of Section 2012 of The Chicago Code of 1911 which makes it an offense to engage in any fraudulent scheme, device or trick to obtain money or other valuable thing. While this language is broad, it is so vague that prosecutions may be found difficult.

I find, therefore, that there is not now any law with which this evil can be successfully fought.

While this is true, however, I feel convinced that an ordinance can be drawn by which the perpetration of such frauds can be stopped. The courts are inclined to give the widest latitude to legislative or municipal enactments having for their object the stamping out of traffic in obscene literature, and an ordinance of this kind, which would clearly have

a tendency to cleanse the moral atmosphere, could be so drawn as to be effective, and it would undoubtedly be held valid.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,

Corporation Counsel.

NOVEMBER 23, 1911.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

You request the opinion of this department as to whether a provision can be legally incorporated in specifications of contracts for improvements of roadway by special assessment, requiring contractors bidding for such work to purchase creosoted blocks for use in the improvement, *only from a municipal plant*. You further add that the blocks would be furnished to the contractors at a stated price.

Section 74 of the Local Improvement Act (Chap. 24, Hurd's Revised Statutes, 1909, page 472), provides in part that

"All contracts for the making of any public improvement to be paid wholly or in part by special assessment or special tax * * * shall be let to the lowest responsible bidder in the manner herein prescribed, such contracts to be approved by the president of the board of local improvements."

The question here presented is whether the incorporation of a provision in specifications that all blocks used in the municipal paving work must be purchased from a municipal plant would be contrary to the provisions of the above section on the ground that they would tend to restrict competitive bidding for work.

In the case of *Adams v. Brennan*, 177 Ill. 194, the Supreme Court, speaking of a resolution of the Board of Education for the employment of union labor only, say:

"It is plain that the rule adopted by the Board and included in this contract is a discrimination between different classes of citizens and of *such a nature as to re-*

*strict competition and increase the cost of work * * **
 The fact that the Board may have been of the opinion that its action was for the benefit of the public cannot afford a justification for limiting competition in bidders and requiring them to abandon the right to contract with whomsoever they may choose for the performance of the work."

The requirement of the Board of Education that only union labor should be employed was likewise criticised in that case as tending to create a monopoly in favor of certain persons or classes of persons, or members of certain societies.

In *Fiske v. People ex rel. Raymond*, 188 Ill. 206, upon an application for judgment of sale for delinquent assessments, the court, while overruling an objection to the improvement ordinance for the reason that the union labor ordinance on which the objection was founded was of a subsequent date, nevertheless, said:

"If any bid or proposal had been made, or any contract had been entered into, by which the contractor, doing the work upon this improvement, agreed to hire only persons who are members of labor unions, a different question would arise."

In *McChesney v. People*, 200 Ill. 146, the court characterized a provision or restriction in a competitive bidding as unlawful and against public policy. It was there said:

"It is a material and important right of the property owner that there shall be free and open competition, unrestricted by illegal and unconstitutional provisions, the natural tendency of which would be to increase the cost of the work and it is undeniable that the clauses in question in this case lay down rules which would naturally increase such cost and be detrimental to the public."

In an opinion by the writer hereof, dated October 19, 1903, to the then Commissioner of Public Works, it was said:

"I am therefore of the opinion that this specification (limiting the labor performed upon a public work of the City to a day of eight hours) attached to and made a part of a contract for public work, awarded by competitive bidding, is illegal and void, and that the City cannot force contractors to adopt an eight hour day under such contracts."

(Opinions of Corporation Counsel—Tolman's Edition, page 526.)

A special assessment ordinance, which provided for the use of Trinidad asphaltum obtained from Pitch Lake in the Island of Trinidad, was condemned in *Fishburn v. City*, 171 Ill. 338, on the ground that such asphalt was only obtainable from one place, namely, Pitch Lake, and that lake was owned by the Barber Asphalt Company, and that the specification of this material eliminated free and competitive bidding.

In *Glover v. People*, 201 Ill. 545, an ordinance was in question wherein contractors were obliged to base their bids upon a specification which provided that no laborer should be allowed to work more than eight hours a day. This was held by the court to unduly restrict competition in bidding.

In *Siegel v. City of Chicago*, 223 Ill. 428, the requirement in a specification that Warren's Bitulithic Pavement should be used for wearing surface was held to be void, not for the reason that the ordinance provided for the construction of an improvement with the use of a patented article, but for the reason that it eliminated competition.

It appears to us to be obvious that if contractors were obliged by the specifications to purchase creosoted blocks at a municipal plant many contractors would be unwilling to bid in a case where so large a component portion of the material to be used must be obtained at a fixed price from the City.

Our attention is nowhere called to the fact that creosoted blocks can be produced and sold by the City at a cost less than that at which they could be marketed by other producers, and we doubt if any such situation could be shown. Compelling a contractor to buy his materials of the City where it is not shown that the City can sell cheaper than other persons, would necessarily compel him to eliminate his own methods of purchase and adopt those prescribed by the municipality. It is safe to say that many contractors are so much impressed with the economy of their own methods of purchasing materials for contract work that they would be unwilling to compete in work wherein the purchase of important materials from the City at a fixed price was made obligatory.

The Supreme Court in many of the cases above referred to has called attention to the fact that to compel a contractor to work his force only eight hours a day would place him at

a disadvantage in bidding for a public work in comparison with a contractor who was free to work his men as long as they would be willing to work, and that such disadvantageous comparison would necessarily restrict bidding on a public work. As between two contractors, the one able to purchase his materials in the open market, and the other obliged to purchase from the City at a fixed price, there can be no question but that the same disadvantage exists, and this being so, the resulting limitation in the bids which such contractors would make is self evident.

If the City can compel contractors to use its paving blocks at a fixed price, it can, by the same *rationale*, compel contractors to use its tar, stone, concrete and most, if not all, of the other materials which go into the work of street paving. This condition of affairs, while it might tend to secure a uniformly excellent class of materials used in pavement construction, would not be conducive to the most favorable bids and lowest cost of improvement to the public and property owners.

Another consideration which might be urged, if it were necessary, is that the sale of creosoted block by the City, and only by the City, for work in street pavements, would necessarily tend to create a monopoly. We can see no reason why a monopoly should be any more tolerated on the part of the City than on the part of any person or corporation.

In *Fishburn v. City*, *supra*, page 343, it is said:

“If all the ordinances adopted by the City Council of the City of Chicago providing for the paving of streets and public places in the City should select the stock in trade of a particular firm or corporation as the only material to be used in making such street improvements, the evil would be intolerable; and if they may lawfully select such article in one ordinance it cannot be unlawful to make it the settled policy of the City that material for paving streets shall be purchased of but one seller.”

It is well settled law that all contracts in which the public are interested, which tend to prevent competition whenever a statute or rule of law requires competition, are void.

City of Chicago v. Rumpff, 45 Ill. 90.

People, ex rel. v. Chicago Gas Trust Company, 130 *id.* 268.

Foss v. Cummings, 149 *id.* 353.

On the whole question, we conclude that there would be no legal authority for placing in contracts for municipal improvements, a specification requiring contractors to purchase creosoted blocks at a municipal plant at a fixed price.

In our consideration of this question, and in an expression of the views herein contained, we have not touched upon the power of a municipality to establish a plant for the sale of creosoted blocks to contractors, and nothing herein expressed should be considered as an intimation of any view for or against the existence of such a power; the sole question under determination being the propriety of a specification in a public improvement contract requiring contractors to purchase paving blocks from a municipal plant.

Very respectfully yours,
 JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:
 WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 24, 1911.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

I have before me your letter of June 30, 1911, to the Corporation Counsel, in reference to certain correspondence addressed to the Mayor by Henry Martin & Company, 126 South Water street, in regard to the right of the City of Chicago to lease to the Indiana Transportation Company the five foot wharf or dock strip on the south side of the Chicago River, between Clark and Dearborn streets. Complaint is made of the tying up of the Steamer Roosevelt, causing obstruction of light, poor ventilation, etc., for South Water street merchants whose places of business back up to said five foot dock strip.

The rights of the City in and to the dock strips bordering upon the Chicago River and opposite certain blocks of the Original Town of Chicago have been passed upon by this department on various occasions heretofore, and all of the opinions to which I have had access have determined these rights

in favor of the City. Charles M. Haft, Assistant Corporation Counsel, wrote an opinion dated June 10, 1908, *in re* right of owners of property on South Water street between Clark and Dearborn streets to protest against the City permitting the owner of the steamer Roosevelt to occupy the dock abutting said property. In this opinion Mr. Haft concludes that the claim of the said alleged owners and occupants that the dock in question is on their property, is without legal foundation and that said parties have not the right to object to the owners of the steamer Roosevelt using said dock for the purpose of landing passengers with their ordinary baggage.

The Mayor desires to know whether the opinion of the present Corporation Counsel coincides with that of former Corporation Counsel Brundage, who approved the opinion of Mr. Haft, as to the title to the dock.

It appears from a copy of a memorandum hereto attached and bearing date March 21, 1911, that the Indiana Transportation Company has the use of the dock and docking privileges on the south side of the Chicago River between Dearborn and Clark streets for the season of 1911 at a charge of \$350.00, which memorandum is signed by B. J. Mullaney, Commissioner of Public Works, and accepted for and on behalf of the Indiana Transportation Company by its President and General Manager.

An Act was passed by the State Legislature, approved February 27, 1847, to adjust and settle the title to the wharfing privileges in Chicago and for other purposes. Section 1 of this Act provides that the Common Council of the City of Chicago shall have full power and authority to discontinue and vacate any part of South Water, North Water, West Water and East Water streets, which lies beyond a line eighty feet distant from the line of lots laid out on the sides of said streets farthest from the river, (sometimes known as "Wharfing Privileges") and to adjust all conflicting rights between the City and the claimants of said wharfing privileges. By this Act the Common Council was authorized to make and establish all necessary ordinances, rules and regulations, and to execute and deliver all such agreements and conveyances, and to take or receive any and all such agreements and con-

veyances as it should deem proper to effectuate such settlement.

This Act is supplemented by a later Act approved February 11, 1853, to adjust and settle the title to the Wharfing Privileges. The latter Act provides that the Council shall have authority to discontinue and vacate the whole or part of any of the foregoing streets, and to adjust rights in dispute by conveyance in fee, by deed, or otherwise. Both the said Acts with the exception of the fifth section of the first mentioned Act, were ratified and continued in force by the Act of the Legislature granting a charter to the City of Chicago, passed February 13, 1863, (Chap. 22 of Charter, Sec. 15, Tuley's Laws and Ordinances, page 574.)

In pursuance of these legislative enactments the Common Council of Chicago passed ordinances in adjustment of wharfing privileges, as follows:

- a* An ordinance vacating part of Water street on the south side of the Chicago river, passed February 11, 1848;
- b* An ordinance discontinuing parts of East Water street, passed February 11, 1848;
- c* An ordinance discontinuing that part of East Water street in the City of Chicago which lies between Randolph and Madison streets, passed June 19, 1848;
- d* An ordinance vacating parts of North Water street, passed June 19, 1848;
- e* An ordinance vacating parts of West Water street, passed September 12, 1853;
- f* An ordinance vacating parts of West Water street in front of Blocks 8 and 13, passed December 10, 1855;
- g* An ordinance vacating parts of East Water street, old North Water street and East Carroll street, passed February 14, 1856; and
- h* An ordinance establishing certain dock lines, passed February 14, 1856.

(See Tuley's Laws and Ordinances of Chicago, 1853, Chap. 29, pages 369 to 377.

See also Laws and Ordinances of Chicago, 1890, Sections 4548 to 4570.

The first four ordinances above set forth make no mention of any wharfing strip, but each of the ordinances passed, respectively, September 12, 1853, December 10, 1855, and February 14, 1856, contain substantially the following reservation:

“Ten (10) feet next and adjoining the river of said wharf shall be and always remain an open wharf upon the same conditions and restrictions as contained in the settlement of the *wharfing privileges on the south side of the Chicago River.*”

These ordinances apply respectively to West Water street, East Water street, old North Water street and East Carroll street, and make the above reference to the conditions and restrictions contained in the settlement of the wharfing privileges on the south side of the Chicago River.

The ordinance first above referred to vacating part of Water street on the south side of the Chicago River, passed February 11, 1848, is to be found at pages 369 and 370 of Tuley's Laws and Ordinances of Chicago, and as there published consists of only two sections and does not contain the reservation of a five foot wharf strip for the use of the public. It seems, however, that the terms of the settlement including this reservation were embodied in another and separate ordinance passed by the Common Council on the same date, which was officially known and designated as “Proposition for settling wharfing privileges on South Water street and on East Water street north of Randolph street.” I have not been able to find this proposition in any of the published volumes of special ordinances or in any of the volumes of municipal laws of Chicago to which I have had access. It apparently was never recorded in the book of ordinances and seems to have been omitted through an oversight. (See notes, Thompson's Municipal Laws of 1856, pages 449 and 455.) I have, however, had several searches made among the files now in the City Clerk's office and just a couple of days ago I located the proposition for settlement above referred to. The file cover bears the following endorsement:

“Document No. 1408, Proposition and Ordinance for settlement of S. Water St. Wharfing Privileges, passed

February 11, 1848, filed December 9, 1854, H. W. Zimmerman, Clerk."

The file contains two documents. Endorsed on the back of one of these documents is the following:

"1929, copy of ordinance passed February 11, 1848, Exhibit D, City of Chicago, State of Illinois, *et als.*, filed April 18, 1850, L. D. Hoard, Clk."

This document is the ordinance above referred to and found at pages 369 and 370 of Tuley's Laws and Ordinances. On the back of the other document is the following:

"1929 Exhibit 'B.' copy of proposition passed Feb. 11, 1848, City of Chicago, State of Illinois, *et als.*"

The introductory paragraph of this proposition sets forth the desirability of adjusting the so-called wharfing privileges, then follows an ordinance of twelve sections setting forth the terms to be embodied in the settlement, the pertinent portions of which are briefly as follows:

Section 1. That the City will assent to a settlement of all conflicting claims in regard to so much of the public landings on South and East Water streets as are situated in front of Blocks 16 to 21 inclusive of the Original Town of Chicago, upon the following basis: South Water street to be eighty feet wide, to be measured from the South line of the street.

* * * * *

Section 3. Original grantees from the State, or their legal representatives, shall be entitled to wharfing privileges in front of their respective lots.

Section 4. Provides for the adjustment of wharfing privileges opposite Block 21.

Section 5. The persons entitled to wharfing privileges shall severally secure to the City the sum of \$2,250.00 for each corner lot of 40 feet frontage, and at the rate of \$4,000 for each 80 feet of the remaining frontage.

Section 6. Contracts and writings shall be executed to give full and final effect to the settlement.

Section 7. "*Five feet on the river front of the public landings herein proposed to be transferred shall be and forever remain an open wharf, for the free use of persons passing on foot. Passengers by water shall in no case be charged*

wharfage or be subject to any charge whatever for landing their ordinary traveling baggage upon said wharf."

Section 8. Reservation of excavation rights by the City.

Sections 9 to 12 provide for the collection of interest and the disposition of the fund.

I have also found from an examination of the files of the Chicago Daily Democrat in the library of the Chicago Historical Society, various reports and publications of the Council proceedings of the City of Chicago in the years of 1847 and 1848, which unquestionably show that an ordinance was passed by the Common Council in adjustment of the wharfing privileges on the South side of the river as referred to in the clause contained in the three aforesaid ordinances and in pursuance of the aforesaid Act of February 27, 1847. In the report of the Council proceedings of October 5, 1847, published October 9, 1847, I find that Alderman Boone on behalf of the committee of the whole on wharfing privileges presented a report and moved that the part relative to the South division be taken up by sections which was carried by a vote of 15 ayes, nays none.

After various introductory recitals the City Council resolved that the City of Chicago will assent to a settlement of all conflicting claims to so much of the public landings of said City as are situated upon South Water street and in front of Blocks 16, 17, 18, 19, 20 and 21, upon the following basis:

1st. South Water street to be established 80 feet wide.

2nd. Owners of lots fronting thereon to be entitled to wharfing privileges.

3rd. Premises proposed to be transferred to owners of lots to extend North 55 feet from the North line of South Water street as proposed to be established.

4th. Persons entitled under this proposition severally to secure to the City the sum of \$4,500 for each corner lot and \$4,000 for each inside lot of 80 feet frontage on South Water street.

* * * * *

6th. The City of Chicago and individuals interested to execute all contracts and writings lawful and necessary to give full effect to these propositions.

* * * * *

8th. Fifteen feet on the river front of the public landing herein proposed to be transferred, to be and forever remain, an open wharf for the free use of persons passing on foot and for the use of fire engines.

9th. Passengers by water in no case to be charged with wharfage or subject to any charge for landing ordinary traveling baggage upon any of the premises referred to, etc.

* * * * *

In the report of the Council proceedings of November 5, 1847, published in the Chicago Daily Democrat, November 11, 1847, I find proposed modifications of the foregoing propositions as follows:

The fourth proposition to be modified so that the corner 40 feet should secure the payment of \$2,254.00 and the inside frontage should secure at the rate of \$1,000.00 per 80 feet front.

The eighth proposition to be modified so that only five feet on the river side of the premises transferred was required to be kept for the use of foot passengers.

The ninth proposition was to be modified with reference to wharfage charges.

These modifications when put upon passage were lost, two-thirds of the members of the Common Council not having voted in favor of the same as provided by the said act of February 27, 1847.

At a later meeting, however, of the Council held December 10, 1847, the proceedings of which were reported in the Chicago Daily Democrat December 21, 1847, the aforesaid ninth proposition was amended so as to allow wharfage to be charged on all articles except ordinary traveling baggage and except upon the baggage of immigrants, which shall be removed within thirty minutes of the landing thereof, etc.

The report of the committee on modifications, presented November 5, 1847, as amended, was then adopted, ayes, 13, nays, none. In the Council proceedings of February 11, 1848, published in the Chicago Daily Democrat February 18, 1848, it was ordered that blank forms of deed, mortgage and stipulation or agreement submitted to the Council be approved, and that the wharfing privilege committee cause a suitable

quantity of said blank forms to be printed for the use of the committee in the adjustment of the various wharfing claims, and that the committee cause all such papers to be executed on the part of the City.

It appears that the proceedings of the Common Council, as above reported in the Chicago Daily Democrat, substantially agree with the said proposition found on file in the office of the City Clerk, with the slight exceptions of difference in numbering the sections and the amounts of money to be secured on South Water Street frontage. These amounts, it seems, changed from time to time as the negotiations progressed.

The printed form of deed by which the 55 foot strips lying between the North line of South Water street and the Chicago River were conveyed contained substantially the following clause:

“Subject, nevertheless, to the condition that 5 feet in width extending the whole length of the front of said premises on the river shall forever remain an open wharf or dock, to be built and maintained in good order and repair by said party of the second part, his heirs and assigns, for the free use of passengers on foot, and that in no case shall passengers by water be subject to any charges whatever for landing their ordinary traveling baggage and conveying the same over said wharf, and that the top of said wharf shall at all times be properly and safely planked or covered so as to afford secure passage for such passengers and baggage.”

This clause without doubt constitutes a covenant running with the land and binds and burdens it in the hands of all future owners. Those who accepted the original wharfing lot conveyances and their grantees, however remote, cannot now claim the benefit of these deeds and refuse to bear the burdens which they impose.

The early abstract makers failed to include in their minutes the above provision for said five foot strip. I have been able, however, to locate one of these original deeds which is now in the possession of Mr. J. P. O'Connor, who is at present in the employ of The Chicago Title and Trust Company and has been for many years an abstract maker employed by vari-

ous companies in the City of Chicago. This original deed contains the above clause, and conveys the property immediately East of and adjoining the premises now occupied by Henry Martin and Company.

I have been able to locate in the Recorder's office the records of seven other of these deeds which have been re-recorded since the great fire of 1871, and one of these conveys the property occupied by Henry Martin and Company. Another conveys the lot at the corner just East of Henry Martin and Company. These three tracts lie opposite Block 17 of the Original Town of Chicago. Four of the other re-recorded deeds convey tracts in the block immediately East of Dearborn street and opposite Block 16 of the Original Town.

I have also found in the Recorder's office re-records of three of the mortgages given by the grantees to the City of Chicago for security as set forth in the preceding ordinances.

In the case of the *Sanitary District of Chicago v. Norton Milling Company, et al.*, No. 226,802, in the Circuit Court of Cook County, which was a condemnation proceeding, Judge Edward F. Dunne entered an order February 13, 1903, (Rec., 206; page 47) with reference to a wharfing strip along wharfing lots 4 and 5 block "O" in the Original Town of Chicago, wherein the Court adjudged and decreed that certain persons were the owners of said premises subject to an easement on the East ten feet of said lots, as reserved by ordinances of the City of Chicago, vacating West Water street, dated January 29, 1849, and September 12, 1853. Similar orders were entered by the Court in the same suit as to two other tracts. This adjudication, which is of comparatively recent date, finds that the City of Chicago still has its original wharfing privileges.

The powers of the City Council enumerated in the Cities and Villages Act bearing upon the questions involved herein, are as follows:

Paragraph 32. "To erect and keep in repair public landing places, wharves, docks and levees."

Paragraph 33. "To regulate and control the use of public and private landing places, wharves, docks and levees."

Paragraph 37. "To collect wharfage and dockage from all those rafts and other craft landing at or using

any public landing place, wharf, dock or levee within the limits of the corporation."

I am of the opinion that said five foot strip constitutes a public landing place, wharf, dock or levee within the meaning of the above enumerated powers of the City.

Henry Martin and Company set forth that this strip has been leased to the Indiana Transportation Company. The memorandum of agreement between said transportation company and the City of Chicago, copy of which is hereto attached, recites that—

"In consideration of the payment of \$350.00 permission is hereby given to the Indiana Transportation Company to have the use of the dock and docking privileges on the south side of the Chicago river between

Dearborn and Clark streets for the season of 1911, for the purpose of docking their steamers 'Theodore Roosevelt' and 'United States' and their substitutes and consorts, and taking on and discharging passengers at the following times."

and sets forth at what hours the said transportation company may use said landing place; and further provides that the City shall keep said dock clear and free from obstruction by other persons or boats at the times mentioned. This memorandum is not strictly speaking a lease, but rather a contract for wharfage and dockage at a public landing place or dock.

I am, therefore, of the opinion that the former opinion upon this subject written by Charles M. Haft, Assistant Corporation Counsel, and bearing date of June 10, 1908, and which was approved by Edward J. Brundage, the then Corporation Counsel, was proper and correct in all of its particulars and that the City has the right to grant permission to the Indiana Transportation Company to use the said dock as a public landing place and to charge and collect wharfage and dockage for the same, and that the owners on South Water street have not a legal right to object to the granting of such permission.

In view of the fact that the instruments relating to this easement have not all been published and the reservation of the same is not shown in abstracts of title, I respectfully sug-

gest that either the above mentioned original deed (now in the possession of Mr. O'Connor) or photographs of the same, be obtained by the City if possible, and placed on file with the City Clerk.

I desire to state that this opinion has been much delayed owing to the fact that the matters involved are of ante-fire origin, that the sources of information are very scant, that it has been a very tedious task to collect the facts herein set forth, and that while working upon the same the writer has been many times requested to take up other matters of immediate and pressing importance.

I return herewith the letter of the Mayor dated June 30, 1911, the two letters of the Commissioner of Public Works dated respectively June 29 and 30, 1911, the letter of H. V. McGurran, Superintendent, Compensation Bureau, dated June 28, 1911, copy of the opinion of Charles M. Haft, dated June 10, 1908, copy of the memorandum of agreement between the City of Chicago and the Indiana Transportation Company, dated March 21, 1911, and the letter of Henry Martin & Company dated June 23, 1911.

Respectfully submitted,
JAMES G. SKINNER,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 24, 1911.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Your letter in reference to the suppression of the sale of candy by means of cards in billiard rooms, cigar stores and other places of that character, to which was attached a communication from manufacturers, jobbers and retailers engaged in the candy business, was turned over to me for consideration.

You stated in your letter that you wished the matter taken up with these people and an opinion given to you as to

whether this card system of disposing of candies was a gambling device or not.

Acting on your direction I communicated with the representatives of the trade who had called on you, and I had a conference with them, in which they explained the different card systems used and stated their position fully.

The systems represented by the different cards formerly in use vary slightly, but the general plan is the same in all. One style of card has fifteen squares, on each of which is a number. These numbers run from 1 to 15, but are distributed hap-hazard. Over each of these numbers is pasted a small paper wafer or seal. In the corner of the card is a larger seal, under which is concealed a number that was also taken at random and which corresponds with one of those on the squares. The purchaser pulls off one of the small seals, thereby exposing a number. He pays the amount, from 1 to 15 cents, represented by this number. His name is then written in the square or some other record is kept of it. When all the small seals have been torn off, the sum of \$1.20 has been received by the dealer, who thereupon tears off the large seal and exposes the number underneath it. The person who has drawn the corresponding number then receives a box of candy said to be worth \$1.20. There are cards that contain only 12 numbers, where the total received amounts to 78 cents, and the winner gets an 80-cent box of candy. Others contain no blanks, and the purchase price is fixed at 5 or 10 cents, and each purchaser receives some return for his money, but the size of this return varies from a small package to a large box of candy. Thus it will be seen that the principle is the same in all these systems, however much the details may differ.

There is no doubt about the law applicable to the case. This method of disposing of goods is a gambling device—a lottery scheme—under the law. All the three essential elements are present. There is a consideration paid, a prize is offered, and the distribution is a matter of chance. Even where there is something given in return for each payment, the receipt of a larger or smaller package constitutes the element of chance that brings it within the definition of a lottery

scheme. The court decisions holding this to be the law are numerous, and there is no conflict of opinion on the subject.

The parties I interviewed practically conceded the point when I explained to them that the device is not within the law. One of them admitted that his private counsel has advised him to this effect. Their efforts were directed mainly to the arguments which they make in the communication referred to above and others of a like nature.

They stated that the systems in vogue resulted in the sale of large quantities of candies which otherwise would not be sold, that children did not participate in such sales because they do not frequent the places where same take place, that the amount realized on the whole card in each case is the exact price for which the candy delivered sells at retail, and expressed their views on other matters connected with the traffic.

Since all this is foreign to the question of the lawfulness of this method of doing business, however, it does not change the legal aspect of the case. The authorities are uniform as to that, all holding that such devices are contrary to law.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

CHICAGO, NOVEMBER 27, 1911.

HON. JOHN McWEENY, General Superintendent of Police.

Dear Sir:

Your communication with reference to improper or careless conduct in the dissecting room of the Jenner Medical College was referred to me for an opinion.

You state that the dissecting room of this institution is located on one of the upper floors of a building fronting on Washington street opposite the windows of the Chicago Telephone Company, that frequently the students hold amputated arms and other members of dead bodies, either purposely or otherwise, in full view of employes of the Telephone Company, and that considerable illness has been caused among

the latter by such abhorrent sights. You also state that you have notified the college officials to frost the windows or take such other action as may be necessary to prevent outsiders from looking into this room, but to no effect; and you ask whether you should deal with this condition as if it were a common nuisance, and if so, what proceedings to institute.

The use of the dissecting room in the manner described unquestionably makes it a public nuisance.

A nuisance generally is defined as "anything that worketh hurt, inconvenience or damage."

5 Words and Phrases, 4855 *et seq.*

Under this generalization is included "anything which is offensive to the senses and which renders the enjoyment of life and property uncomfortable."

Coker v. Birge, 9 Ga. 426.

West v. State, 71 Ark. 144.

The sense of smell is most readily offended. When anything causes a stench that inconveniences the public, therefore, it is immediately recognized as a nuisance. Things that offend the sight or hearing are sometimes not so readily classified as nuisances, but the same rule applies to them. When a thing is so repulsive as to cause sickness among persons not more than ordinarily susceptible there can be no doubt about it, however, since it is not necessary that a thing must be so obnoxious that it endangers health before it can be regarded as a nuisance. It is sufficient if it is detrimental to the comfort of those dwelling or working in the neighborhood, or to passersby. *Ashbrook v. Commonwealth*, 64 Ky. 139.

"The criterion for determining whether or not a particular use of property is a nuisance is its effect upon persons of ordinary health and sensibilities, and ordinary modes of living, and not upon those who, on the one hand, are morbid or fastidious or peculiarly susceptible to the thing complained of, or, on the other hand, are unusually
* * * * *
insensible thereto."

Am. & Eng. Enc. of Law, 2nd Ed., Vol. 21, p. 687.

Under the rule stated in the above excerpt as applied to matters offensive to the sight, the keeping of jacks and stallions, and standing them to mares, within full view of a dwell-

ing house, was held a nuisance in *Hayden v. Tucken*, 37 Mo. 214; the mere showing or exhibiting of stallions was so regarded in *Nolin v. Town of Franklin*, 12 Tenn. 163; also an exhibition of effigies in a window, in *Rex v. Carlile*, 6 C. & P. 636.

In an action for breach of covenant not to use premises for any injurious or offensive purpose, it was held that an undertaker's establishment with dissecting room was within the terms "injurious and offensive" and constitutes a nuisance.

Rowland v. Miller, 15 N. Y. Suppl. 701.

From the authorities cited above it appears quite clear that the matter complained of is a nuisance. That it is a public nuisance is equally clear, in spite of the fact that the matters complained of may not be visible from the street.

Whether a thing is a public or private nuisance depends not so much on the number of people who are affected by it as on the possibility or likelihood of any one of the general public being inconvenienced. Thus, it has been held that a thing may be a public nuisance although it affects only one person. (*Emory v. Hazard Powder Co.*, 22 S. C. 476.) Also that it may be such where the obnoxious thing is within full view of only one dwelling house. (*Hayden v. Tucker*, 37 Mo. 214.) Consequently, the fact that such objectionable sights in this case are several stories above the street and probably visible only to the employes of one company located directly opposite does not change the character of same in this respect.

The objection might be urged that these parties are conducting a lawful business, and that therefore this feature of it cannot be classed as a common law nuisance.

No business which is in itself lawful, can be regarded as a nuisance *per se*, but it may be conducted in such a manner that it becomes a nuisance.

Windfall Mfg. Co. v. Patterson, 149 Ind. 414.

Kinney v. Koopman, 116 Ala. 310.

As to the method of procedure, since prosecution under Section 1429, relating to common-law nuisances, is the most expedient way of dealing with the matter, I recommend that

the method prescribed in Article XXVI of the Chapter on Health in the Chicago Code of 1911 be followed:

This makes it the duty of the Commissioner of Health to give 24 hours notice before beginning suit. If no response is made, suit should be instituted and the parties conducting the college subjected to a fine, if found guilty. It is especially desirable that notice be given in this case, because it will probably be found that the persons really responsible are students or subordinates who have been admonished not to offend in this way.

Yours very respectfully,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 28, 1911.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Pursuant to your request to the Corporation Counsel, I herewith submit an opinion on the question of whether the cost of constructing conduits under the surface of the street for the purpose of street lighting can be defrayed by special assessment under the Local Improvement Act of 1897.

The immediate occasion for the question is a letter to Your Honor from Aldermen Theodore K. Long and William R. Parker, dated October 3, 1911, stating their belief that it is desirable that whenever pavements are to be laid in streets, which it is contemplated to light under the existing contract with the Sanitary District, the electric conduits for lighting such streets should be first laid, so as to avoid tearing up new pavements; and asking for an opinion as to whether the cost of constructing the conduits can be met by special assessment.

This question involves two considerations: First: Does an assessment for electric conduits fall within the scope and theory of the Local Improvement Act so that it can be sustained as a matter of law? Secondly: If such an assessment

be theoretically possible are there practical considerations of fact and circumstances that make it inexpedient to proceed by special assessment?

The legality of special assessments for electric lighting equipment has already been passed by the Supreme Court, and in several instances, sustained. The court treats the transmission of electric energy by means of wires as analogous to the conveyance of water or gas through pipes. The court, however, limits the power of special assessments to the means of distribution, that is, to the pipes and hydrants in case of water, and the poles, wires and lamps in case of electricity, so that no assessment can be levied for a central pumping station, or for a plant for the generation of electricity.

The earliest case involving electric lighting equipment to come before the Supreme Court, which I find, is that of *Smith v. City of Chicago*, 169 Ill. 257. The Supreme Court there denied the power to maintain the assessment, but the opinion was not based upon anything relating to the legality of the assessment for electric lighting purposes, but was predicated solely upon defects in the ordinance. The ordinance provided for electric lamp-posts on both sides of Ogden avenue from Madison street to 12th street, and then undertook, without making proper provision for the same, to authorize an assessment not only for lamp-posts but also lamps, cables, posts and switches.

In the case of *Carpenter v. Capital Electric Co.*, 178 Ill. 29, no question of special assessment was involved, but the court says that in respect to public streets and alleys the legal relations of electric light wires are analogous to those of gas pipes, for the reason that both electric light wires and gas pipes are the means of furnishing lights from a central source of supply, where the light is to be transmitted by wires or pipes for the benefit of the public as well as the property owners along the line of the street.

In *Ewart v. Village of Western Springs*, 180 Ill. 318, the Supreme Court had occasion to pass directly upon the validity of a special assessment for electric lighting equipment, and sustained the same. The ordinance provided for the construction of a power-house and generator-plant of an electric light-

ing system, together with the engine, generator and appliances, located at the power-house, the same to be paid for by general taxation. The ordinance further provided for poles, electric conductors, lamps and appliances included therewith, the latter to be paid for by special assessment. The court sustained the ordinance, finding that the generator-plant was of public benefit, while the poles, lamps, etc., were of local benefit. The court examined the cases of special assessments for laying water-mains. (*Hughes v. City of Momence*, 163 Ill. 535; *O'Neill v. People*, 166 Ill. 561; *Hewes v. Glos*, 170 Ill. 436; and *Harts v. People*, 171 Ill. 458) in which cases it was held that the pumping works, standpipe and buildings which are of general utility must be paid for by general taxation, while the pipes and hydrants which conveyed and distributed the water along particular streets are local improvements and may be paid for by special assessment. The court says "The improvement which consists in the erection of poles, wires and lamps in an electric light system is certainly as much a permanent improvement as the water mains and hydrants are in a system of water works."

In *Lingle v. West Chicago Park Commrs.*, 222 Ill. 384, the court sustained an ordinance which provides for a multiplicity of improvements consisting of paving, building storm-water sewers, etc., etc., including constructing and installing electric light conduits, cables, switches, man-holes, lamp-posts and lamps.

The further question now arises: Is the laying of electric conduits only, without the other parts of a complete electric street lighting equipment a local improvement or must other elements be added to the conduits in order to sustain an assessment within the scope of Art. 9, Sec. 9, of the Constitution of Illinois, and within Sec. 1 of the Local Improvement Act of 1897? As construed by the Supreme Court a local improvement must possess these characteristics: It must be for a public purpose; it must be relatively permanent, as distinguished from what is ephemeral and transitory; and it must confer special benefits on a portion of the property within the municipality as distinguished from benefits to all the property generally. (*City of Chicago v. Blair*, 149 Ill.

310; *City of Chicago v. Law*, 144 Ill. 569; *Village of Morgan Park v. Wiswal*, 155 Ill. 262; *N. W. University v. Wilmette*, 230 Ill. 80; *Hewes v. Glos*, 170 Ill. 436; *Loeffler v. City of Chicago*, 246 Ill. 43.) Whether an improvement possesses these characteristics is a question of fact, not of law. (*Wilson v. Board of Trustees of Sanitary District of Chicago*, 133 Ill. 443.)

It is therefore first necessary to determine what items must be included in connection with the construction of conduits in order to constitute such an improvement as will meet these tests and especially the requirement that it must confer benefits.

The purpose of the inquiry made by Aldermen Long and Parker is to decide whether all the underground work in respect to electric lighting can be done by special assessment so as to obviate tearing up new pavements. A conduit itself is merely a tile pipe divided into longitudinal compartments. The complete underground work in connection therewith consists of conduits, wires, cables, man-holes and laterals, the latter being cables extending from the conduits to the lamp-posts just within the curb lines. The above ground work consists of lamp-posts and lamps; and a combination of all these elements of under-ground and above-ground work is necessary before electric energy can be made effective for lighting purposes. The only part of the under-ground work which can be omitted without subsequently tearing up the streets is the stringing of the electric cables through the conduits. The conduits, man-holes and laterals must all be laid at one time to avoid subsequent destruction of pavements.

From the form of the question submitted it is apparently not intended that the above-ground work, viz., lamp-posts and lamps, should be combined in the assessment for the under-ground work. In such case, however, the objection might be raised that the improvement was ineffectual for lighting purposes without the addition of the above-ground work, and that it would therefore be invalid, under the doctrine of *Hutt v. City of Chicago*, 132 Ill. 352, which is that a special assessment cannot be levied to defray the cost of an improvement where the improvement sought to be constructed, when

completed, will be ineffectual without a further improvement which will involve further action on the part of the municipal authorities before it can be constructed. I am of the opinion that the objection would be well taken. The analogy of under-ground electric lighting equipment to water-mains is not complete, because in all cases where an assessment for water-mains has been passed on by Supreme Court, the ordinance has provided for fire hydrants, and benefits have been predicated on increased fire protection, and the improvement in such case is complete in itself, where under-ground electric equipment is not effectual in itself and in itself confers no benefits. It is not a complete improvement.

In *Ewart v. Village of Western Springs*, 180 Ill. 318, the court, *arguendo*, uses language attributing to water-mains without hydrants the character of a local improvement, but I am of the opinion that this is not to be taken as a reasoned conclusion of the court on that subject and in that same case the improvement under consideration consisted in the erection of poles, wires and lamps in an electric lighting system, that is, everything outside of the central plant necessary for street lighting.

Keeping the foregoing considerations in mind, I am of the opinion that the laying of conduits only, or of conduits, man-holes and laterals, is not a local improvement, but that the installation of conduits, cables, man-holes, laterals, lamp-posts and lamps for street lighting purposes, when confined in each case to a limited area, is a local improvement that may be constructed by special assessment proceedings under the Local Improvement Act. The purpose is a public one, the improvement is relatively permanent and it is capable of conferring special benefits upon adjoining property. Such improvements can be so made as to comply with these tests.

The practicability of the exercise of such power, however, is greatly influenced and in my opinion lessened by certain considerations of fact which should be kept in mind in connection with this question.

II. THE FACTS THAT MODIFY THE PRACTICAL VALUE OF THE POWER TO ASSESS FOR CONDUITS AND OTHER ELECTRIC LIGHTING EQUIPMENT.

1. *The facts with reference to the obligation of the Sanitary District to the City.*

The contract between the Sanitary District and the City of Chicago is set out in full in the Journal of the Proceedings of the City Council for October 3, 1910, pages 1447 to 1454, with an amendment thereto on page 1489 of the Proceedings for October 10, 1910. The contract was executed in 1910, and by its terms was to be effective for a period of seven years, of which term six years now remain. The contract provides (Dec. 10) that:

“Said District agrees to furnish and install in the streets, alleys and other public places in said city, as hereinafter specified, all conduits, wires, cables, powers, poles, lamp-posts, electric lights and other electrical devices and equipment necessary to change and convert the present direct current arc lamps into improved modern equipment as may be agreed upon by the Electrical Engineer of the District, and the City Electrician of the City.”

Under this contract as interpreted, by Mr. William Carroll, the City Electrician, the Sanitary District can be required to construct conduits, and other electric equipment, in the particular streets named in the letter of October 3, 1911, from Aldermen Long and Parker, and in all other streets now to be improved where lines are to be installed or old equipment is to be changed into new. In all such cases where the Sanitary District is pledged to put in the conduits and other equipment, a special assessment cannot be maintained for that purpose. This is analogous to cases where a street railway company is obligated by ordinance to pave its right of way; in such cases to assess any part of the cost of paving such right of way against private property is invalid. (*City of Chicago v. Cummings et al.*, 144 Ill. 446.)

A similar rule applies to cases for paving a street, portions of which, viz., railroad subways and the approaches thereto, are required to be paved under track elevation ordi-

nances. The principle is, that it is inequitable to assess the owners of private property for the cost of so much of the paving as is imposed by ordinance or contract on some particular person or corporation. In this case the Sanitary District being obligated to install conduits and other equipment, in certain streets, the owners of private property cannot be compelled by special assessment to pay for that which the Sanitary District is obligated to pay for. In respect to every street, therefore, as to which it may be desired by the Board of Local Improvements to have electric equipment installed before the pavement is laid, there must always be a question of fact to be determined, viz.: Is the street one in which the cost of constructing the equipment must be borne by the Sanitary District? If the answer is in the affirmative, an assessment cannot be maintained.

The effect of the Sanitary District contract upon the question of benefits.—The construction of conduits with all the other under-ground equipment necessary for the transmission of electric energy would of itself confer no benefit upon abutting property, just as the laying of water or gas mains without any provision for a supply of water or gas would be no foundation for an assessment for benefits. Before benefits can be predicated it must appear to the court that lawful provision has been made by ordinance or otherwise for a supply of water, gas or electricity as the case may be.

This is an application of the doctrine of the Hutt case. (*City of Chicago v. Hutt*, 132 Ill. 352.) If lawful, that is, compulsory or certain provision has been made for a permanent supply, or a supply to last as long as the life of the improvement, the benefits will be measured accordingly. If the supply—though lawfully provided for, is for a limited period only, this must be taken into consideration in estimating benefits.

The general rule above stated is recognized in *Palmer v. City of Danville*, 154 Ill. 156, where the court says (page 163): "It may be conceded that to make the water-pipe connections available or beneficial, it was the duty of the City Council to provide water-mains to convey the water to them—

in other words to make provision for a supply of water—otherwise the connections would be useless and would not be an improvement at all of benefit to any one. (*Hutt v. City of Chicago*, 132 Ill. 352.)” In this case a special tax was levied for the cost of water supply pipes for house connections with the water-mains of a private company. The ordinance under which the private main was laid and maintained had not been given in evidence and as no advantage of this was taken in the court below, the Supreme Court says (page 163): “We must presume in the absence of any evidence to the contrary that the city has preserved and guarded its own rights and those of its inhabitants in its contract with the water company.”

In *Gault v. Village of Glen Ellyn*, 226 Ill. 520, the court says (page 526): “The village would not be authorized to levy a special assessment to raise a fund with which to place water-mains in the streets of the village unless it had provided a water-supply pipe for use in connection with said mains, as a special assessment cannot be levied to defray the cost of the improvement, where the improvement sought to be constructed when completed, will be ineffectual without further improvements, which will involve further action on behalf of the municipal authorities before it can be constructed.” The court held that this rule had been complied with by evidence that the village had leased a private water works for a term of fifteen years.

In every case however the question of benefits will be one of fact, and will include as one of its elements the duration of the supply. In the question now submitted for this opinion, the electric energy for all street lighting is derived from the Sanitary District under the contract above referred to, which has a period of six years yet to run. The question for the jury will therefore be: How much will the property assessed be benefited, that is, enhanced in value, by the construction of electric lighting equipment to be provided with electric energy for a period of six years only? For the law will not permit any presumption to go to the jury as to a longer period of supply than can be shown by this contract. I am of the opinion that in such case the benefits would be

comparatively light and would not meet the cost of construction.

In conclusion, I am of the opinion :

1. That the laying of conduits only, or of conduits, man-holes and laterals, is not a local improvement, but that the installation of conduits, cables, man-holes, laterals, lamp-posts and lamps for street lighting purposes, when confined in each case to a limited area, is a local improvement that may be constructed under the Local Improvement Act, and the cost thereof defrayed by special assessments so far as benefits can be shown.

2. That the Sanitary District of Chicago is obliged, under its contract with the City of Chicago, to construct conduits and other lighting equipment in certain streets, and that in all such cases no special assessment for such work can be maintained.

3. That on account of the contract between the Sanitary District of Chicago and the City of Chicago the question of benefits to property assessed for this class of improvements must be limited to such enhancement of value, if any, as will result from the construction of such electric lighting equipment as is indicated above, to be provided with electric energy for a period of six years only.

That in view of the foregoing considerations special assessments cannot be maintained in respect to certain streets on account of the obligation of the Sanitary District; that in all other cases on account of the short term of the Sanitary District contract, the benefits in the opinion of the writer will be little more than nominal and will not to any substantial extent defray the cost of the improvement, with the result that such cost would be assessed against the City of Chicago as a public benefit to be payable out of the general fund. The benefits being thus restricted by the short term of the Sanitary District contract, it is at present inexpedient, although lawful, to undertake to do this class of work by special assessment.

Respectfully submitted,
EUGENE H. DUPEE,
Assistant Corporation Counsel.

Approved:

PHILLIP J. McKENNA,
Attorney Board Local Improvements.

NOVEMBER 28, 1911.

HONORABLE FRANK J. WILSON, Chairman of City Council Committee on Water Department.

Dear Sir:

In compliance with the request of Honorable William H. Sexton, Corporation Counsel, I herewith submit an opinion on the question referred to him in your letter of November 21, 1911, wherein you ask "whether or not a high-pressure water system in the Stock Yards district could be installed by special assessment, assessing only the property benefited by the improvement, because of lower insurance rates."

You do not describe the details of the proposed high-pressure system, but I presume that it will comprise all that is necessary for a high-pressure water supply, including a central pumping station with pumps, buildings and possibly stand pipes, and also the necessary mains, house connections and fire plugs.

If a general high pressure water system were intended for the entire city only the mains, service pipes and fire hydrants could be provided by special assessment proceedings, while the central pumping plant would have to be paid for by general taxation. This is on the ground that the former would be of special and local benefit, while the latter would be of benefit to the entire municipality. (*Hughes v. City of Momence*, 163 Ill. 535; *O'Neil v. People*, 166 Ill. 561; *Hewes v. Glos*, 170 Ill. 436; *Harts v. People*, 171 Ill. 458; *Ewart v. Village of Western Springs*, 180 Ill. 318.)

In your project, however, the high pressure system is to be confined to a district which, although large, is only a small part of the entire city. In such case the benefits would be special to the Stock Yards district and a proceeding for the central plant and pumping station, as well as the mains, etc., could be sustained, as a proper exercise of the power of special assessment, for the benefit in such case from the pumping station would specially affect the property within the Stock Yards district. This comes within the principle of the case of *Fisher v. City of Chicago*, 213 Ill. 268, where it was held that a pumping station for sewage, and a system of sewers in connection therewith covering but a portion of a city are a

local improvement which may be constructed by special assessment. The court there says (page 272): "The substantial benefits to be derived from it are local in their nature, and a portion of the city, where the sewers are laid, will be specially and peculiarly benefited in the enhancement of property. The system of sewers and a sewage pumping station, although a benefit to a considerable area in the city, covers but a small part of the city and is not like a general water works plant or a plant for street lighting, which is of **general utility** to all the inhabitants of the municipality." To the same effect is *Northwestern University v. Wilmette*, 230 Ill. 80.

I am therefore of the opinion that a high-pressure water system in the Stock Yards district is a local improvement which could be installed by special assessment proceedings under the Local Improvement Act. To what extent the benefits to real estate within the Stock Yards district will meet the cost of the improvement is a question for the opinion of real estate experts and does not affect the legality of the proceedings provided any substantial benefit can be shown. Such benefit will be predicated upon increased fire protection. The courts have recognized this as a proper element of benefits. (*Chicago Union Traction Co. v. City of Chicago*, 202 Ill. 576.) If the benefits do not meet the cost of the improvement, the difference will have to be assessed against the City of Chicago as a public benefit, payable out of the general fund.

Respectfully submitted,

EUGENE H. DUPEE,

Asst. Atty., Board of Local Improvements.

Approved:

PHILLIP J. McKENNA,

Attorney for the Board of Local Improvements.

Approved:

WM. H. SEXTON,

Corporation Counsel.

NOVEMBER 28, 1911.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Your communication asking for an opinion in regard to your power to revoke two licenses for saloons, one at 40th avenue and Jackson boulevard and the other at 40th avenue and Wilcox avenue, has been referred to me.

I find that when the applications for these two licenses were filed the customary police report was made upon the same, and that in both cases the report, which was signed by the license officer, captain of police and inspector of police in charge of the district, and approved by the general superintendent of police, states that the location "is not within two hundred and fifty feet of any church, school or in an exclusive residence district."

Your letter, however, states that these locations are in a strictly residential district, so that it may be assumed that the licenses in question are granted upon a mistake of facts, based upon the police reports.

There can be no doubt that these licenses could have been refused. In the case of *Swift v. People*, 63 Ill. App. 453, the refusal of the Mayor to issue a saloon license for a location within a purely residential neighborhood was upheld on the ground that even though the city ordinance does not specifically grant any discretion to the Mayor in the issuance of licenses, he nevertheless has such a discretionary power. This case has been cited on several occasions with approval by the Supreme Court, and the exercise of discretion by the Mayor of Chicago in refusing saloon licenses where the saloon is to be near a public school, a private school or church, has also been upheld.

Harrison v. People ex rel. Raben, 222 Ill. 150;

Dunne v. Kretzmann, 130 Ill. App. 469;

Dunne v. Kretzmann, 228 Ill. 31;

Harrison v. People ex rel. Jaeger, 101 Ill. App. 224.

The sole question, therefore, is whether or not the license having been issued upon mistake of facts, it can be revoked for the same grounds upon which its issuance could have

been refused. The authorities on this point are to the effect that:

“A license issued under a mistake of facts necessary to authorize its issuance, may be revoked, and the officer issuing it is not estopped by his conduct in issuing it to revoke or cancel it.”

1 Woollen & Thornton on Intoxicating Liquors, Sec. 441;

In re Clement (Dunbar Certificate), 118 N. Y. App. Div. 575;

In re Cullinan (Davidoff Certificate), 87 N. Y. App. Div. 47.

The Mayor's power to revoke saloon licenses is obtained through Section 1536 of The Chicago Code of 1911, which reads as follows:

“REVOCATION OF LICENSES.) Any license granted under this article may be revoked upon written notice by the Mayor, whenever it shall appear to his satisfaction that the party so licensed shall have violated any provision of any ordinance of the city relating to intoxicating liquors or any condition of the bond provided for in Section 1526 of this article. Upon complaint to the mayor that any place licensed as a saloon is a resort of disreputable persons, the Mayor shall cause an investigation to be made as to such complaint, and if found to be true, he shall forthwith revoke the license issued to keep such saloon. Upon report to the Mayor by the department of police that any saloon is the resort of disreputable persons, the Mayor shall at once revoke the license of the keeper of such saloon.”

It will be noted that no discretion is specifically given to the Mayor by this section, other than that of determining whether there has been a violation of any city ordinances, or of the conditions of the bond, and whether or not a complaint made to him in pursuance of the ordinance is true. However, Section 1526 of The Chicago Code of 1911, by which the authority to grant saloon licenses is given to the Mayor, does not specifically give him any discretion whatsoever, and yet, as shown above, the courts have allowed the Mayor a wide discretion in such matters and it would appear that the reasons for holding that such a discretion exists would be even stronger in the case of the revocation of licenses where

a certain amount of discretion is specifically given by the ordinance.

All saloon licenses issued by the City of Chicago contain the provision that—

“This license with all the rights under it, is subject to revocation at the discretion of the Mayor, and this license with all the rights under it, shall terminate absolutely upon the notice of such revocation being left at the bar, and the person, to whom it is issued, shall stand in the same position as if he had not taken out any license.”

Parties accepting saloon licenses with the provision in them that they are subject to revocation at the discretion of the Mayor, thereby assent to such terms and conditions.

If the Mayor has no authority to insist upon a licensee accepting a saloon license containing a provision in regard to revocation which is not specifically provided for in the ordinances of the City, the licensee has the right to refuse to accept the same and to compel the Mayor by mandamus to issue to him such a license as the courts may determine is proper in form. But if the licensee does accept such a license, by accepting and acting under it, he has consented that the Mayor may, under the terms of the same, in his discretion, revoke it. No question as to whether or not the clause of the licenses as above set forth should properly have been inserted therein, can, therefore, now arise.

Schwuchow v. City of Chicago, 68 Ill. 444;

Wiggins v. City of Chicago, 68 Ill. 372;

Malkan v. City of Chicago, 217 Ill. 471;

25 Cyc. 626 (C);

Harrison v. People ex rel. O'Hare, 124 Ill. App. 519.

I am, therefore, of the opinion that it lies within your power as Mayor of the City of Chicago to revoke the license for a saloon located in a strictly residential district, where the license was issued on a mistake of facts, for the reasons above stated, to wit: first, that there is as much discretion given to you by the ordinances in regard to revoking licenses as in regard to issuing them; second, because a license issued under a mistake of facts necessary to authorize its issuance, may be revoked, and, third, because the licensee by accepting

the license has consented to its terms, thereby agreeing that it may be revoked at your discretion.

Yours respectfully,

S. CRAWFORD ROSS,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 29, 1911.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Your request for an opinion in respect to your power to restore a dramshop license after the same has been revoked for cause, has been referred to me.

The effect of an unqualified revocation of a dramshop license is to extinguish the license.

23 Cyc. 161.

Black on Intoxicating Liquors, Sec. 196.

Woolen & Thornton on Intoxicating Liquors, Sec. 456.

The ordinances of the City of Chicago provide for the revocation of dramshop licenses, but the subject of the restoration thereof after revocation is not mentioned in either the ordinances or the State Statutes.

The practice of restoring revoked dramshop licenses by the Mayor has obtained for years, but such practice appears to rest upon no more substantial basis than custom.

The liquor ordinances now in force limit the number of dramshop licenses and provide for renewal of licenses which have been kept in force continuously. The right to a renewal of a license is in many cases assigned by the licensee to another person and belongs to such person at the time when the license is revoked for some delinquency of the licensee, to which delinquency the owner of the right to renewal of the license was not a party. In such cases if the license is revoked, the right to a renewal thereof will thereby be extinguished unless there is a legally valid restoration of the license.

In view of the foregoing I deem it very desirable that the

power to restore revoked dramshop licenses should be expressly conferred upon the Mayor by ordinance, instead of resting as at present merely on a practice of doubtful legality.

In the case of *People v. Cregier*, 138 Ill. 401, the Supreme Court of Illinois, in speaking of the power of cities and villages to license, regulate and prohibit the sale or giving away of any intoxicating, malt, vinous, mixed or fermented liquor, held that Subdivision 46 of Section 1 of Article V, R. S. of Illinois—"confers the power to license, regulate and prohibit the sale of such liquors without qualification or restriction, thus leaving the whole subject to the absolute and unrestricted discretion of such municipal authorities."

I am of the opinion that an ordinance conferring upon the Mayor power to restore dramshop licenses which have been revoked by him would be valid, and I would recommend an amendment to Section 1536 of The Chicago Code of 1911, entitled "Revocation of licenses," by adding thereto the following:

"If any license granted under this article shall be revoked by the mayor, he may, at his discretion, rescind such revocation at any time before the expiration of the license period for which such license was granted, and such license, with all rights to a renewal or re-issue thereof, shall thereupon be restored to full force and effect as if it had not been revoked."

Yours respectfully,

BRYAN Y. CRAIG,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

NOVEMBER 29, 1911.

HON. JOHN McWEENY, Chief Superintendent of Police.

Dear Sir:

Your inquiry with regard to the right of William Storz, located at 10062 Prospect avenue, to maintain a bottled beer depot in prohibition territory, was referred to me for an opinion.

The report of the officer, attached to your letter, states that the party in question has a place at the above address from which he delivers beer to the surrounding neighborhood.

The report did not state whether such beer is sold in quantities of less than one gallon, but I assume from the nature of the business that such sales are of a quantity amounting to one gallon or more; consequently the business in question comes within the definition of wholesale malt liquor dealer as defined in Section 1553 of the Chicago Code of 1911.

The location is within the territorial limits of the former Village of Washington Heights; consequently the prohibition ordinance which was in force in that village prior to annexation controls in that neighborhood. The only limitation placed upon the liquor traffic by that ordinance is contained in the following provision:

“No license shall be granted for the keeping of any dramshop or saloon within the Village of Washington Heights at a place which is not situated within two hundred feet of Vincennes avenue.”

It will thus be seen that dramshops and saloons are prohibited, but there is no prohibition therein so far as the sale of liquors by persons who do not keep saloons or dramshops are concerned.

A dramshop is specifically defined both by statute and by the ordinances of the city. It does not include a business in which liquors are sold in this way, if not sold in less quantities than one gallon. While the word “saloon” generally has a broader meaning than the word “dramshop” it has in one respect a more restricted meaning than the definition of “dramshop” made by the statute and ordinance referred to in so far as it relates to the premises where refreshments are served and certainly cannot be held to include a place where liquors are not drunk on the premises.

If the party in question, therefore, is disposing of malt liquors in quantities of more than one gallon and has a license

as a wholesale malt liquor dealer, he is within his rights and cannot be interfered with.

Respectfully,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 29, 1911.

MR. HENRY ERICSSON, Commissioner of Buildings.

Dear Sir:

Your communication of November 21, 1911, addressed to Mr. William H. Sexton, relative to tearing down a dangerous frame structure at Nos. 6434-36 Stony Island avenue, has been referred to me for attention.

The question for this department is, who shall tear down dangerous structures, and if there is any expense attached to tearing down of these structures, how shall this expense be met?

Section 202, Paragraph D, of the Chicago Code of 1911 provides that whenever the Commissioner of Buildings shall find any building in a dangerous condition, he shall serve notice upon the person in possession, charge or control of such building. If at the expiration of the time specified in the notice the work has not been done "then it shall be the duty of the Commissioner of Buildings to proceed forthwith to tear down or destroy that part of said building or structure that is in such unsafe condition as to endanger life or property and in cases where an unsafe building or structure cannot be repaired or rendered safe by the application of precautionary measures said building or structures or the dangerous parts thereof *shall be torn down by the said Commissioner of Buildings or by his order*, and the expense of tearing down of any such building or structure shall be charged to the person owning or in possession, charge or control of such building or structures, or part thereof, and the said Commissioner shall recover or cause to be recovered from said owner or person in charge or control thereof, the costs of

doing such work, by legal proceedings, prosecuted by the law department."

Under the provisions of this section you will observe that you have the authority to order the tearing down of any dangerous structure. If provision had been made in the last appropriation to meet such expenses, all that would be necessary for you to do would be to make a requisition upon the Business Agent of the City to order the building torn down. I have examined the last appropriation and find that no money was reserved for this purpose.

We understand further that appropriations have never been made for this purpose, but that in each instance when wrecking was required, the Building Commissioner would authorize a wrecker to do the work and that the bills for such work have been presented to the Finance Committee. This arrangement has been unsatisfactory as we understand that the wreckers would not only have to wait several years for their money, but in addition to this, the wreckers were taking chances of not being paid at all since the City is not liable, in any event, to pay in case no appropriation is made.

May v. City of Chicago, 222 Ill. 599.

Until some appropriation is made we would therefore advise you to follow the usual custom of having the City Wrecker do the work and having him present his bill to the Finance Committee, the same as heretofore, as long as the wrecker is satisfied to take his chances on the payment.

We would further recommend that you be in touch with the nature of the work sufficiently to advise the Finance Committee as to the reasonableness of the bill presented, in case such information is desired. In this connection it might be well to get two or three bids for the purpose of ascertaining what would be the reasonable value of such wrecking, which information the Finance Committee would be interested in knowing when the bill was presented.

You also desire to know whether you should refer any part of this matter to any department of the City with a view of ascertaining the title to the property and you desire to be informed what proceedings to institute to recover for the City the money spent in tearing down the building.

In this connection our suggestion would be that you handle these collections the same as you have heretofore. Up to the present time whenever the City Wrecker presented his bill to your department, your department would draw up a warrant and turn same over to the Comptroller. The Comptroller would send a copy to the City Collector and if the City Collector was unable to collect, he would return same to the Comptroller. The Comptroller then sent the warrant to the Corporation Counsel for collection and prosecution by suit if necessary. Questions of ownership and title, which require investigation for the purpose of ascertaining who shall pay the wrecker's bill, have been investigated by this department after the warrant had been sent to this department for collection.

We would advise you therefore that until an appropriation is made, the course here outlined be followed as in the past, and that upon the presentment to your department of the wrecker's bill, you send a warrant to the Comptroller for this amount, whereupon your responsibility ceases.

Respectfully submitted,

MAX M. KORSHAK,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

DECEMBER 1, 1911.

HON. CARL T. MURRAY, Chairman Sub-Committee of the School Committee.

Dear Sir:

Pursuant to your request to Mr. Sexton, for an opinion upon the right of the City Council to furnish books to pupils free of charge and whether they can be furnished at cost, I beg to advise you.

Upon October 23, 1911, Aldermen Block and Reading introduced into the Council an order directing the Board of Education to proceed forthwith to supply all text books used in the Chicago Public Schools at cost price to school children.

In considering this question we must bear in mind that

this is a subject over which the Council has no power. Education in this city is entirely intrusted by statute to the Board of Education and the powers of the Board expressly prescribed. The same statute, Hurd's Revised Statutes of Illinois, 1908, Ch. 122, Act 6, Sec. 184, prescribes:

"All schools in said cities shall be governed as heretofore stated and no power given to the Board of Education shall be exercised by the City Council of such city."

I have investigated, however, the question whether the Board of Education can exercise the powers governed by the resolution. The Board of Education can exercise only the powers prescribed by statute.

A typical case in our courts upon this subject is found in *School Directors, etc., v. Fogleman*, 76 Ill. 189. Speaking of school boards the court says:

"These bodies can exercise no other power than expressly granted, or such as may be necessary to carry into effect a given power, and it is fortunate for the people this power is so restricted."

Again it is said in *Glidden v. Hopkins*, 47 Ill., page 529:

"The Board of Education, like all municipal bodies, has only such powers as are expressly given it or as result by fair implication from the powers granted."

Under the statute above cited the powers of the Board are as follows:

178. (POWERS OF BOARD.) The said Board of Education shall have power.

FIRST. To furnish schools with the necessary fixtures, furniture and apparatus.

SECOND. To maintain, support and establish schools and supply the inadequacy of the school funds for the salaries of the school teachers from school taxes.

THIRD. To hire buildings or rooms for the use of the board.

FOURTH. To hire buildings or rooms for the use of the schools.

FIFTH. To employ teachers and fix the amount of their compensation.

SIXTH. To prescribe the school books to be used and the studies in the different schools.

SEVENTH. To lay off and divide the city into school districts, and from time to time alter the same and

create new ones, as circumstances may require, and generally to have and possess all the rights, powers and authority required for the proper management of schools, with power to enact such ordinances as may be deemed necessary and expedient for such purpose.

EIGHTH. To expel any pupil who may be guilty of gross disobedience or misconduct.

NINTH. To dismiss and remove any teacher whenever, in their opinions, he or she is not qualified to teach, or whenever, from any cause the interests of the school may, in their opinion, require such removal or dismissal.

TENTH. To apportion the scholars to the several schools.

ELEVENTH. To lease school property and to loan moneys belonging to the school fund.

TWELFTH. To grant the use of assembly halls and class rooms when not otherwise needed, including light, heat and attendants, for public lectures, concerts and other educational and social interests free of cost, but under such provisions and control as they may see fit to impose.

I have been able to find but one case in Illinois upon this question. This is the case of *Harris et al. v. Kill*, 108 Appellate, page 305. The Board of Education of Chicago had adopted the following resolution:

“RESOLVED, That this Board deems it advisable to the best interests of the taxpayers of this city, and in order to secure to all children in this city a good common school education, that free text books be and they are hereby adopted for the first four grades of the elementary schools beginning with the school year 1901-2; and be it further

RESOLVED, that the superintendent be and he is hereby directed to report within thirty days to the school management committee proper rules and regulations for the purchase of the necessary text books for the free use of the pupils of the said four grades, and their distribution and use by all pupils enrolled in these grades at the beginning of the fall term of 1901.”

A bill was filed to restrain the Board of Education from carrying out the purposes of this resolution. Hon. Charles G. Neely granted an injunction against the school board, upon which an appeal was taken to the Appellate Court. That

court, speaking through Mr. Justice Burke, sustained the injunction denying the power of the Board of Education.

Excerpts from the opinion of Mr. Justice Burke in the Appellate Court are as follows:

"It will be seen that no specific grant of power to furnish text books for the free use of all scholars can be found in this enumeration of the powers" (referring to the powers of the board as prescribed by the statute, *supra*).

"Nowhere among the powers of the board can a specific grant of power to furnish free school books be found. If the power exists it must be found under the general grant of power in the seventh item of powers, or it must arise by implication from the body of powers granted and the evident purposes it had in view by the Legislature in passing said statutes."

"It must, however, be said that the constitution is not self-executing and that the legislature must, either by general or specific grant, give the power to the board to purchase with public school funds, text books for the wealthy, before we can hold that the board has such power."

"It is a general rule that an attempted enumeration will limit the general terms. It is admitted by appellants that so rapid has been the growth of the City of Chicago that the board of education has not had money to erect school houses sufficient in number to accommodate children of the city. It is claimed, however, that the board has rented rooms temporarily to accommodate all children."

"It is a serious question whether scores of thousands of dollars should be appropriated to purchase school books for the children of parents abundantly able to furnish their own children with books where there is so pressing need for the expenditure of money in other directions for equipping the public schools of Chicago."

"Upon an examination of the school laws applicable to the various classes of the districts it is found that the legislature has most carefully limited the powers of directors and boards in certain directions and we do not think that the power of the board in this case to purchase books for free general distribution can by any fair implication be recognized."

"In justification of the resolution of the board to furnish free text books to rich and poor alike, it is urged that such action secures increased and longer attendance

of pupils. Other inducements attendant with more or less expense to the public, such as transportation to and from the home of the child, would doubtless result in larger attendance, but the offering of such inducements could not find warrant among the itemized powers and duties of the board."

"To place firm restrictions about the expenditure of public moneys often, in particular cases, contravenes a cherished desire and thwarts a philanthropic purpose, but experience teaches that the conservative course more efficiently promotes public interests. The authority and power to expend public moneys set apart for school purposes should be clearly restricted. As was said in *School Directors v. Fogleman*, 76 Ill. 191:"

"The authority of the board must not be extended nor its powers enlarged, either by intendment or by any strained construction of the statute."

"We have considered the compulsory education laws of this state, but are unable to find therein any expression which by intendment or fair implication can be construed as giving the board authority to make free distribution of school books to all pupils of the first four elementary grades."

"We are of the opinion that the powers granted for general management of schools do not authorize the board to distribute school books for the free use of all pupils. Such power to expend school moneys in ways new and untried in this state should first be clearly granted by the legislature and not assumed by the zeal of boards of education or by the construction of courts."

I am informed that some time ago the Board of Education attempted to secure the sale of books to pupils at cost price. The practice adopted was to have the publishers, who were under a contract, deliver the books to various school houses, where they were sold at cost price by the principals. The practice was continued but a short time, owing to the confusion and impracticability of making the principals the distributing agents.

My conclusions are that as the law now stands,

1st. This is a subject over which the City Council has no jurisdiction.

2nd. School books cannot be furnished free of charge to pupils, excepting the indigent.

3rd. There is no power in the school board to expend

any money or suffer any loss in attempting to supply books to pupils at cost price.

4th. The only manner in which anything can be done along this line is following the policy that the board once adopted as before stated. There might also be some doubt about the legality of even this procedure.

Yours respectfully,

GEO. L. REKER,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

DECEMBER 4, 1911.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

I have your communication of recent date asking whether a permit to open the street and build a cable shaft on the west side of La Salle street north of North Water street, and to install a twelve duct conduit line on La Salle street from Lake street to South Water street, and also to build a shaft connecting with the La Salle street tunnel in South Water street and to connect with surface manholes, can be legally issued, as being authorized by the ordinances to the Chicago City Railway Company and the Chicago Railways Company, passed February 11, 1907.

The character of the work proposed to be done under the permit is shown by attached blueprints, and I am informed by the Engineer of Water Works Construction that the reason and necessity for the permit lies in the fact that it is not thought desirable by either the Department of Public Works or the Chicago Railways Company, which is doing the work, that the conduits carrying electric cables be placed along the walls of the approaches to the tunnel, in which position they would not only be unsightly, but would stain the walls of the tunnel and be generally undesirable. The alternative is to install these cables for the necessary distance in conduits under the sidewalks as far as the beginning of the approaches

of the tunnel, at which points they would rejoin the cables in the street.

Under the ordinance to the Chicago Railways Company passed February 11, 1907, Exhibit B provides in part as follows:

“The Company shall, upon acceptance of said ordinance, proceed immediately, * * * (6) to reconstruct the Van Buren street and Washington street tunnels and to reconstruct or rebuild the tunnel at La Salle street.”

This ordinance also provides in part as follows (Section 34):

“The said Board of Supervising Engineers forthwith upon its organization shall prepare plans and specifications for the complete reconstruction of the tunnel under the Main Chicago River at La Salle street, including the work of removing the present tunnel at said La Salle street so far as the same may be necessary to meet the requirements of the Government of the United States as to navigation of the Chicago River at said point, and so far as may be necessary to allow the complete reconstruction of the tunnel at said street * * * and submit both said plans and specifications to the Commissioner of Public Works of the City for his approval subject to such direction, if any, as the City Council of said City may prescribe. Upon such approval the Company shall diligently proceed under contracts to be approved by said Board of Supervising Engineers to the complete reconstruction of said Washington street and said La Salle street tunnels according to said plans and specifications.

Said work of reconstruction shall be done in a safe, secure and workmanlike manner *to the satisfaction and with the approval of the Commissioner of Public Works.* * * * Whatever detailed plans or specifications may be necessary in the opinion of said Board of Supervising Engineers shall be provided during the process of said construction and *shall be subject to the approval of said Commissioner of Public Works.*”

The question of whether connecting the tunnel by a shaft with ducts and the placing of such ducts in a street is an incidental and necessary part of the general construction of this tunnel, is a question of fact to be decided by you. If, in your discretion, it appears that the cables in question can

be installed in the manner contemplated by the permit in a more practicable way by putting them under ground instead of placing them along the tunnel approach walls, I think the authority may be legally conferred upon the Company to do the work in this manner. The work is of such a nature that it may be readily conceived to be a part of the tunnel construction and appurtenant and necessarily related thereto. If you so decide, the permit may be properly issued, but I do not think there is any obligation upon you to issue the permit unless you do so decide.

Allow me, in addition, to call your attention to the fact that the permit does not conform to the provision contained in Exhibit B, heading, "General Specifications," sub-head "Permits," which provides as follows:

"The Company, before it makes any excavation in or in any way interferes with the surface of any street or public way for the purpose of doing any work, shall obtain from the Commissioner of Public Works of the City a permit so to do, which permit shall contain a condition requiring the Company to restore said street or way and maintain it for one year thereafter; and in every case the Company, after it has restored such street or way shall maintain it for one year after such restoration."

A provision requiring the Company to restore the street in compliance with the above section should be inserted in the permit.

Yours respectfully,
JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Council.

DECEMBER 4, 1911.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Your communication dated December 1, 1911, requesting an opinion with reference to the requirements for frontage consents for lumber yards, has been referred to me for a reply.

Section 664 of The Chicago Code of 1911 provides as follows:

“LUMBER YARDS—NOT TO BE LOCATED NEAR RESIDENCE EXCEPT BY CONSENT.) No person or corporation shall establish, maintain, conduct or operate any lumber yard or place where new or second-hand lumber is kept for sale or is stored for seasoning or drying on any premises fronting on any street in any block where two-thirds of the buildings on any street surrounding any such block are used exclusively for residence purposes, unless the written consent of the owners of a majority of the frontage on both sides of the streets surrounding the block in which it is proposed to locate, establish, conduct or maintain such lumber yard or place, be first obtained by the person or corporation desiring to establish, maintain or operate such lumber yard or place, consenting to the issuance of a permit from the department of buildings, and also consenting that a license for the establishment, keeping or maintenance of such lumber yard or place shall be issued by the city. Such written consent shall accompany the application for a license and building permit made by such person or corporation.”

Section 711 of The Chicago Code of 1911, which defines the word “block” provides that where the word “block” is used it shall not be held to mean a square, but shall be held to embrace only that part of the street bounding the square which lies between the two nearest intersecting streets, *unless it shall be otherwise specifically provided.*

We believe that the language used in Section 664 above quoted is sufficiently specific and clearly contemplates that the word “block” shall mean a square.

Under Section 664, therefore, it is unlawful to conduct a lumber yard on any premises fronting on any street in a block where two-thirds of the buildings on any street or streets surrounding such block are used exclusively for residence purposes, *unless the written consent of the owners of a majority of the frontage on both sides of all streets surrounding the block in which it is proposed to locate the lumber yard, is first obtained.*

We desire further to call your attention to Section 665 of The Chicago Code of 1911 which also makes it unlawful to pile lumber within one hundred feet of any private residence,

tenement house or hotel which has been erected since the establishment of the lumber yard containing such lumber.

Yours respectfully,

MAX M. KORSHAK,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

DECEMBER 4, 1911.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

In your letter of recent date, addressed to the Corporation Counsel, which was referred to me, you make two inquiries concerning license numbers on lamps and the display of tariff cards in automobiles and taxicabs for hire.

As to these requirements the ordinances divide vehicles of this description into four different classes. In the first class are included automobiles, auto cars and other similar vehicles kept on public cab and hack stands or authorized to stand upon the streets waiting for employment. The second class includes all taxicabs, and this must be held to mean any vehicle to which a taximeter is attached whether operated from cab stands or simply as a public passenger vehicle or from a licensed garage. The third class includes any such vehicle "used anywhere within the city for the carrying or conveying of persons for hire or reward," from which, however, by reason of other provisions relating to them, we must except such as are operated from public cab stands or by licensed keepers of garages. The fourth class includes all vehicles of this description operated from a garage.

Your first question is whether there is anything in the ordinance which requires these vehicles to display the license number on the lamps of same.

Section 2596 of the Chicago Code of 1911, requires a lighted lamp on each side, with the license number painted thereon, for,

"Every automobile, auto car or other similar vehicle, licensed under the provisions of this article, or

operated or used for hire, or waiting or standing on any public street or place in the night time."

This description would be broad enough to cover all public passenger vehicles of the kind were it not for the express provisions of the article relating to garages. Since the latter are placed in a class by themselves and have provisions of this character applicable to them alone, the section that I have just quoted must be understood to refer to the first three classes of vehicles mentioned above.

Consequently the section applies to all automobiles and taxicabs for hire except those operated from licensed garages. The latter are required by Section 2689 to display a metal plate with the license number, the year, and the words "Chicago Garage" thereon.

Your second question is whether the ordinances require the display of a tariff card the same as required in horse cabs.

Section 2597 requires that rates of fare, and the whole of Sections 2605 and 2606, relating to the carriage of baggage and to lost baggage respectively, be posted within vehicles of the first class mentioned above, in a conspicuous place—that is, on all automobiles, auto cars or similar vehicles which stand on public cab or hack stands or upon the streets waiting for employment. Section 2661 requires that the rates of fare shall be posted in taxicabs.

The ordinances do not require rates of fare to be posted in vehicles of the third or fourth classes mentioned above, except in the case of taxicabs, but the provision is broad enough to cover taxicabs even though they come within the third class or are operated from a licensed garage.

Hence, the tariff card must be displayed in all vehicles of this character except such as are not equipped with taximeters and are operated from licensed garages or from other places than stands on the public streets or ways.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

DECEMBER 6, 1911.

HON. WILSON SHUFELT, Alderman, Second Ward.

Dear Sir:

Your query as above, submitted to this department on the 2nd inst., may be answered as follows:

There is absolutely no provision in the charter of the City which would warrant the exclusion of Chinese restaurants from Wabash avenue.

It is true that in purely residence districts the Mayor is vested with discretion to deny an application for a dram-shop license, but as I understand it, that part of Wabash avenue which is threatened with this Chinese invasion has ceased to belong to that class.

The presumption that opium smoking and gambling will be indulged in cannot be raised.

However, should such be the case the licenses of the places are subject to revocation and the violators become amenable to the criminal laws.

In conclusion, so long as the proposed buildings conform to the ordinances of the City of Chicago and the places are kept free from the taints that you suggest, there is no warrant in the law of the land which would justify the discrimination against the Chinese. Such is the opinion of the Supreme Court of the United States in the celebrated California laundry cases.

Very truly yours,
NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

DECEMBER 7, 1911.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

We have your letter of the 2nd inst., to which is attached a copy of a letter of yours dated October 14, 1911, and addressed to this office, which letter, you say, "has evidently been lost in the office." The original of the letter here re-

ferred to has since been found, and is returned herewith, along with your communication of December 2nd.

From your letter and the letter of the Superintendent of the Rock Island Lines which is attached thereto, we gather that the Rock Island lines admit their liability to pave the portions of the Twelfth street viaduct which you ask them to pave, and that the dispute between you and them has regard solely to the character of the pavement to be put in by them. They claim that the viaduct has been previously paved with blocks five inches high, and that, if they renew the pavement as it was before, they will be doing all that they are bound to do under their contract. You claim that, by reason of the new rails of the street car tracks being seven inches high, it will be necessary to have the new pavement seven and one-half inches high so as to make it come one-half inch above the top of the rails. You say in your letter that "the paving blocks should be seven and one-half inches high."

Mr. Pihlfeldt, the City Bridge Engineer, tells us that it will only be necessary that the entire pavement, foundation and blocks, be seven and one-half inches high; and that this end can be attained by having the plank foundation one and one-half inches thick and the blocks six inches high. However, that is a matter between you and the Bridge Engineer, with which we are not concerned beyond pointing out to you that the railroads cannot be called on to go to more expense than is reasonably necessary to carry out their contract as interpreted below.

We have conferred with Mr. Ramsdell, Superintendent of the Rock Island Lines, and with Mr. Bell, General Counsel of said lines. As a result of these conferences, and of investigations which we have made in your office, we find that the liability of the railroads to pave the viaduct arises under, and depends upon, a contract made by them with the City on the 6th of March, A. D. 1902.

This contract was made as part of a compromise of certain litigation then pending between the railroads and the City, and in pursuance of a resolution of the City Council passed at a regular meeting on the 21st of October, 1901. The parties to the contract were the City of Chicago by the

Mayor and Commissioner of Public Works of the one part, and the Lake Shore and Michigan Southern Railway Company and the Chicago, Rock Island and Pacific Railway Company of the other part. The material portions of this contract relevant to the present controversy are as follows:

The said Railroad Companies:

“Agree to repair and put in perfect order and condition the approaches and all portions thereof, including retaining walls, filling, pavement, planking, railings and sidewalks, of the Clark street approaches to the Twelfth street viaduct and also so much of the Twelfth street viaduct as extends from the east line of Clark street to the South Branch of the Chicago River, and also the approach on Fifth avenue to said Twelfth street viaduct. All of said work to be done by said The Lake Shore and Michigan Southern Railway Company and the Chicago, Rock Island and Pacific Railway Company, to the satisfaction of the Commissioner of Public Works of the City of Chicago.

Said The Lake Shore and Michigan Southern Railway Company and the Chicago, Rock Island and Pacific Railway Company, further agree to forever maintain in good repair, order and condition all portions of said Clark street approaches, and said part of said Twelfth street viaduct extending from the east line of Clark street to the South Branch of the Chicago River and said Fifth avenue approach to said viaduct.

Said The Lake Shore and Michigan Southern Railway Company, and The Chicago, Rock Island and Pacific Railway Company, further agree at any time to make any necessary repairs to said approaches and viaduct which said companies shall be directed to make by the Commissioner of Public Works of the City of Chicago, according to the provisions of this agreement. Provided, nothing herein contained shall be construed to relieve any street railway company from any existing obligation to renew or repair any part of the pavement of said viaduct and approaches.”

We have not been able to find any authority bearing upon the question as to whether or not this contract obliges the railroad companies to bring the new pavement to the additional height required by the new and higher street car rails. On general principles, however, we are confidently of the opinion that, if and when the question comes before

the courts, it will be held that this contract does oblige the companies to make the new pavement conform to the increased height of the street car rails, and to do this at their cost.

Mr. Ramsdell says in his letter:

“So far as we know there has been no arrangement whatever made with the street car company to pave even that portion of the roadway between their tracks.”

Mr. Ramsdell is mistaken as to this. The street car company has agreed to pave the sixteen feet in width which it is obliged under its contract to pave, so as to bring the pavement one-half inch above the new rails as required by the Commissioner of Public Works.

At the conclusion of your letter you ask us to draw an ordinance in accordance with the suggestions which you make. This does not seem to us to be necessary. We would suggest that you serve a notice on the companies, specifying such conditions with regard to the height of the new blocks, or the new pavement, to be put in, as you and Mr. Pihlfeldt may conclude to be necessary; asking them to let you know within ten days whether they will consent to put in the new pavement as so required by you or not; and notifying them that in case they decline to do so, you will proceed to put it in at the expense of the City and that you will hold them liable under their contract to make good the cost of such pavement.

As a result of our conference with the General Counsel of the roads, we are rather inclined to believe that the companies will probably consent to put in the new pavement in accordance with your requirement. If they refuse, it will then be time enough to consider the question whether it will be well to have a resolution of the Council authorizing you to go ahead and put in the pavement at the cost of the City, before you proceed to do so.

Yours very respectfully,

WILLIAM DILLON,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

DECEMBER 8, 1911.

MR. O. MONNETT, Smoke Inspector.

Dear Sir:

Your communication dated December 4, 1911, with reference to the smoke stack on the new Hamilton Club on Dearborn street, between Adams and Monroe streets, has been referred to me for a reply.

You state that the stack will be 167 feet high, which is amply adequate for all of the needs of the building and meets every requirement for smokeless operation from an engineering standpoint; but that the surrounding buildings (and especially the First National Bank Building) are higher than the top of this stack and that you foresee that there will be a great deal of objection on the parts of the tenants of the First National Bank Building and the Hartford Building on account of the smoke and gases even though the stack runs strictly within the smoke ordinances as interpreted today.

You desire to know whether you would have the authority to compel the Hamilton Club to raise their stack to a height at least equal to the height of the adjoining buildings, which would necessitate an addition to the chimney of approximately ninety feet.

Assuming that your statement that the stack runs strictly within the smoke ordinances, is correct, there is nothing in the ordinances under which you can compel the Hamilton Club to build an addition to their chimney.

At present there is no smoke coming from the chimney and no one is injured. When the boilers are actually fired and smoke does damage or annoyance to the adjacent buildings and occupants thereof, or to the public, then such smoke would become a nuisance.

We have carefully examined the ordinances and believe that this matter if it can be regulated at all, might be regulated under Section 1429 of the Chicago Code of 1911, which provides as follows:

“In all cases where no provision is herein made defining what are nuisances and how the same may be removed, abated or prevented in addition to what may be declared such herein, *those offenses which are known to the common law of the land and the statutes of Illinois*

are nuisances may, in case the same exist within the city limits or within one mile thereof, be treated as such, and proceeded against as in this article provided, or in accordance with any other provision of law."

We have examined Hurd's Statutes of 1909, and do not find smoke enumerated within the "nuisances" contained in Section 221, page 795.

However, at common law, the discharge of smoke in such quantities as to affect the health or materially interfere with the comfort of the people living in the neighborhood, or to injure neighboring property was a nuisance. (Dillon on Municipal Corporation, 5th Ed., Sec. 694.)

Nuisances are divided into private and public nuisances. A private nuisance is anything which does hurt or annoyance to the lands, tenements or hereditaments of another, and does not affect the public in general. A common or public nuisance affects the public generally and is such inconvenience which annoys the whole community and not some particular person or persons. (McQuillan on Municipal Corporation, Sec. 440.)

Private nuisances are private wrongs, classed as torts, done to an individual where redress is had by civil suit. Common or public nuisances are denominated as public wrongs and are classified as crimes and misdemeanors, since the damage resulting therefrom is common to the whole community in general, no one being able to assign his particular portion of it. (McQuillan on Municipal Corporation, Section 440.)

By virtue of the foregoing it seems to us that the right to proceed under Section 1429 above quoted depends upon the fact as to whether the nuisance created will be a private or a public one. If it becomes a public nuisance, the right of the city to proceed against it would be unquestioned.

Although courts have defined public and private nuisances, yet it is not always an easy matter to determine what is or what is not a public or a private nuisance upon a given set of facts.

We are of the opinion that at present the City is powerless to act. The fact that you fear that there will be ob-

jections on the part of adjoining owners because the stack will not be tall enough to adequately discharge the smoke properly, in itself, constitutes no nuisance either public or private. We would suggest therefore that no action be taken until the boilers are fired and the character of the damage, if any, by reason of the smoke is determined.

If it then develops that the smoke is a public nuisance, then the city would have a right to abate it. If on the other hand the inconvenience and annoyance will amount to a private nuisance only, then it would be such a nuisance in which the city could not be interested in, and with reference to which it could take no action.

Yours very truly,

MAX M. KORSHAK,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

DECEMBER 9, 1911.

HON. H. D. WILSON, Sec. Chicago Public Library, Chicago, Illinois.

Dear Sir:

Replying to your favor of November 28th to Hon. William H. Sexton regarding the paving of Washington street, in which you ask for an opinion on the following, viz.:

1. The title to the library property being vested in the City of Chicago, should not the City of Chicago pay bills for special assessments for improvements of the streets around the library building?

2. Is the payment out of the Library Fund of a bill for street improvements a proper expenditure of taxes collected for library purposes?

I am of the opinion that the first query is answered in the negative and the second in the affirmative.

The Act of the Legislature of Illinois of March 7, 1872, regarding public libraries, under which the Chicago Public Library was organized, does not exempt the Chicago Public Library from the payment of special assessments. Likewise the Act of the Legislature of the State of Illinois, approved

June 2, 1891, passed in pursuance of an ordinance passed by the Common Council of the City of Chicago upon May 19, 1890, which authorizes the Chicago Public Library to take possession of the piece of ground upon which the Library Building is now located, does not exempt the Chicago Public Library from the paying of special assessments.

The Supreme Court of Illinois has laid down the following doctrine:

“The right of taxation is essential to the very existence of the government, and all property of every description in the State is subject to taxation unless it has been specifically exempted. All laws exempting property must be subjected by the courts to a strict construction and hence nothing will be held to be within the exemption which does not clearly appear so to be.”

People v. Chicago, 124 Ill. 636;

In re Swigert, 119 Ill. 83;

Chicago v. Chicago, 207 Ill. 37.

Regarding special assessments, the distinction between taxation and special assessments is clearly made in our present State Constitution. (Sec. 1-5, 9, Art. 9.) The Supreme Court is firmly committed to the doctrine that exemption from taxation does not exempt from special assessments.

Higgins v. Chicago, 18 Ill. 276;

Chicago v. Colby, 20 Ill. 614;

Peoria v. Kidder, 26 Ill. 352;

Holt v. East St. Louis, 150 Ill. 530;

County of McLean v. City of Bloomington, 106 Ill. 209;

Chicago v. Chicago, 207 Ill. 37.

In the case of *City of Chicago, in Trust for Use of Schools, v. City of Chicago*, 207 Ill. 37, wherein the City of Chicago sought to assess the Board of Education for the improvement of California avenue, the Supreme Court sustained the right of the City to levy such an assessment and the court, speaking through Mr. Justice Wilkin (page 45), said:

“It is also insisted by appellant that the payment of this special assessment out of the school funds would be a diverting of said funds from the object for which they were created. We do not see how that position can be maintained. A special assessment may be levied for

the purpose of paving streets, putting down sidewalks, putting in curbing or for sewer purposes, all of which are, in theory, for the benefit of the property abutting on the line of the improvement. Undeniably all of these improvements are of great benefit, if not of actual necessity, to a public school, and from the most of them no property derives more benefit than does that of the board of education. They are as necessary to the practical use of the property as the furnishing of heat, light and air. Special assessments for such improvements is but a method of applying the funds of the school district for the benefit of its schools, and is legal and proper."

I am of the opinion that no property will derive more benefit from the paving of Washington street with creosoted wooden block than the Chicago Public Library. The street will be more sanitary and also make the building more accessible for vehicles, and principally it will lessen the noises of the street, so that visitors, readers or users of the reference room or other departments of the Chicago Public Library can pursue their studies or researches with more ease and comfort.

The right of the City of Chicago to levy special assessments against the property used by the Board of Education having been judicially determined, it would necessarily follow that the City should levy special assessments against the property used by the Chicago Public Library, where the Chicago Public Library derives a benefit from the improvement to be constructed.

I have the honor to refer you to the opinion of this department dated January 2, 1903, in which Hon. Edgar B. Tolman said, *inter alia*:

"If there be an urgent necessity to pave the streets about the Public Library, a method can be devised for the paving of these streets by special assessment, in which an equitable adjustment can be made of the cost of the improvement, so that the Public Library Board may pay such portion thereof as is equitably to be regarded as of benefit to the library property, and the City can pay as public benefits the portion of the cost of the improvement which represents benefits to the community in general."

I am of the opinion that the City of Chicago should not pay bills for special assessments of the cost of paving the streets around the Public Library.

I am of the opinion that the payment out of the Library Fund of a bill for improving the streets around the Public Library is a proper expenditure of taxes collected for library purposes.

Respectfully submitted,
D. J. NORMOYLE,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

PHILIP J. McKENNA,
Attorney for Board of Local Improvements.

DECEMBER 14, 1911.

TO THE HONORABLE, THE BOARD OF TRUSTEES OF THE FIRE-
MEN'S PENSION FUND:

Gentlemen:

The questions arising on the application of Henry Ent-hoff are largely those of fact, which your Board should determine for itself.

That part of Section 8 of the Act entitled "An Act to create a Board of Trustees of the Firemen's Pension Fund," etc., approved May 13, 1887, in force July 1, 1887, as amended by an Act approved June 1, 1907, in force July 1, 1907, which is applicable to this case, is as follows:

"§8. DEATH WHILE IN THE SERVICE, ETC.—PENSION TO WIDOW—MINOR CHILDREN—DEPENDANT PARENTS—WHEN FUND INSUFFICIENT.) If any member of such fire department shall, while in the service of such fire department, be killed, or die as the result of injuries received while in such service, or of any disease contracted by reason of his occupation, or if any member of such fire department shall, while in said service, die from any cause while in said service, or during retirement, or after retirement, after 22 years' service as hereinafter provided, and shall leave a widow, minor child or minor children under sixteen years of age, or dependant father or mother surviving, said board of trustees

shall direct the payment from said pension fund of the following sums monthly, to wit: * * * to the dependent father, or dependent mother, of such fireman, twenty-five dollars each: PROVIDED, it shall be proven that the deceased fireman at the time of his death, was the sole and only support of such parent or parents. *

* *

It is my opinion that before a pension is granted to a dependent parent under the foregoing section, this board should satisfy itself of two things:

First, that the applicant is in fact a dependent parent; that is, that he has not sufficient means to support himself according to the style in which he has been living.

Second, that the deceased member of the Fire Department at the time of his death was the sole and only support of the applicant.

Moreover, it is my opinion that if a pension is granted to a dependent parent, this board is authorized to discontinue such pension whenever it appears that the pensioner is no longer dependent.

The application of Henry Enthoff should show clearly not only that George C. Enthoff, the deceased member of the Fire Department, has been the sole and only support of the petitioner, but it should further show the amount contributed by the deceased to the petitioner for his support. It should also show not only the value and description of property, real and personal, if any, owned by the petitioner, but as well, of any interest in any such property owned by him at the time of his application, and also the amount of money, if any he has on hand or in banks, and the amount of his income, if any, from all sources, at the time of his application.

I am informed that the petitioner is beneficiary to part of a fund contributed by the citizens of Chicago to aid the widows, orphans and dependent parents of the firemen killed at the Stockyards. This does not appear upon the face of the application, and it is possible that the amount received by the petitioner, together with such other money or property, or interest therein, as he may have inherited since the death of George C. Enthoff may, if properly invested, give the peti-

tioner an income sufficient to support himself in the style in which he had been living prior to the death of George C. Enthoff, in which event this application should be denied.

Very truly yours,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

DECEMBER 18, 1911.

HON. L. E. GOSSELIN, Deputy City Comptroller.

Dear Sir:

I have before me your letter of November 21, 1911, addressed to Hon. Wm. H. Sexton, Corporation Counsel, regarding voucher No. 57855 payable to the order of M. C. Knowles by George Wiley.

I believe that assessments should be paid in the name of the owner and that any or all rebates subsequently declared should be made payable to his order and if he wishes to authorize anybody to collect such rebates for him, he should invest his agent with a power of attorney so to do.

Such power of attorney should specifically state the power of the agent regarding the collection of rebates by the agent for his principal, because as you have fittingly illustrated, the agent may have only a limited power, that is, power to represent the principal in the payment of an assessment, but no power to collect rebates.

Also, if the power of attorney were expressly given to the agent to both pay the assessment and receive the rebates, if any, upon the assessments paid, the lapse of time between the period of payment and the time of payment of the rebates, may be quite an extensive period and the agent's power of attorney may have expired or have been revoked in the interim.

The Legislature of the State of Illinois passed an act authorizing cities, incorporated towns and villages to construct and maintain water works, approved and in force April 15,

1873, which said act is commonly known as "Water Works Act." Section 4 of said act provides as follows:

"The common council of such cities, or trustees of such towns or villages, SHALL HAVE POWER TO MAKE AND ENFORCE ALL NEEDFUL RULES AND REGULATIONS in the erection, construction and management of such water works, and for the use of water supplied by the same, and such cities, towns and villages shall have the right and power to tax, assess and collect from the inhabitants thereof such tax, rent or rates for the use and benefit of water used or supplied to them by such water works as the common council or board of trustees, as the case may be, shall deem just and expedient. And all such water taxes, rates or rents shall be a lien upon the premises and real estate upon or for which the same is used or supplied. And such taxes, rents or rates shall be a lien upon the premises and real estate upon or for which the same is used or supplied. And such taxes, rents or rates shall be paid and collected, and such lien enforced in such manner AS THE COMMON COUNCIL SHALL BY ORDINANCE DIRECT AND PROVIDE."

The power conferred upon the Common Council by virtue of this act has been upheld in the following cases: *Wagner v. Rock Island*, 146 Ill. 139; *Anderson v. Village of Berwyn*, 135 App. 8.

In the case of *Wagner v. City of Rock Island*, *supra*, the court, speaking through Mr. Justice Bailey, said (page 147):

"By Section 4 of the act last above referred to power is given to the proper municipal authorities to make and enforce all needful rules and regulations in the erection, construction and management of the water works and for the use of the water thereby supplied, and to tax, assess and collect from the inhabitants of the municipality such tax, rent or rates for the use and benefit of water used or supplied to them by such water works, as to such authorities shall seem just and expedient."

In pursuance of the authority conferred by this statute, the Common Council of the City of Chicago passed an ordinance which is known as No. 2131 of the Revised Chicago Code 1911, which provides as follows:

"Whenever any special assessment shall be collected by or for the City for the purpose of laying or extending

any water main within said city, there shall be repaid out of the moneys in the city treasury to the credit of the water fund, TO THE PERSON TO WHOM THE SPECIAL ASSESSMENT RECEIPT SHALL BE GIVEN OR UPON HIS ORDER, UPON PRODUCTION OF THE ORIGINAL RECEIPT, the amount for which any such receipt was given (less the rebate previously paid, if any, and less ten per cent .of the amount originally paid and for which such receipt was given), when from the surplus of the net income from the water rates not otherwise appropriated or pledged, there is in the city treasury sufficient money therefor, and when the city comptroller shall so certify; provided, however, that no such money shall be repaid unless the permanent annual water rates derived by reason of the laying of such water main for which any such receipt was given, shall at the time of such proposed repayment, per annum, equal at least ten cents per lineal foot of main, so laid and for which such special assessment was paid."

I am of the opinion that it would be advisable for your department to pay rebates only to the person to whom the special assessment receipt shall be given, or upon his order upon production of the original receipt as provided in the above ordinance.

Respectfully submitted,
DENNIS J. NORMOYLE,
Assistant Corporation Counsel.

WM. H. SEXTON.
PHILLIP J. McKENNA,
Attorney Board of Local Improvements.

DECEMBER 19, 1911.

HON. L. E. GOSSELIN, Auditor, Comptroller's Office.

Dear Sir:

We have your letter of the 13th inst., in relation to the above matter with the papers thereto attached. In this letter you ask us to advise you "whether or not the City should recognize liability insurance as an obligation that can be legally paid according to the terms of the contract."

That is to say, as we understand you, you ask us to advise you whether, on the terms of the contract as made, the City is legally liable to pay this $7\frac{1}{2}$ per cent. upon the pay roll for liability insurance, in addition to the $12\frac{1}{2}$ per cent upon the entire expenditure of the contractor for labor and material, which is to be paid to him as his profit.

We understand that the question is a new one. The practice of making contracts of this kind is a new departure for the City, and hence the particular question here raised has not come up before.

Nothing whatever is said as to liability insurance in the written contract. The contract provides that the City is to pay the contractor "for all work required in tunnels, except pumping, the full cost of labor and material, plus $12\frac{1}{2}$ per cent. for profit."

It is contended on the part of the contractor that the words "full cost of labor required in the tunnels" may, by a liberal construction, be made to include the cost of liability insurance. We can not concur in this contention.

We are of the opinion that the contract, as it stands, does not make the City liable to reimburse the contractor for such sums as he may have expended to insure himself against liability for accidents.

But the Commissioner of Public Works says in his letter addressed to you and dated December 12, 1911, firstly, that in the negotiations with the contractors "It was distinctly understood that such liability insurance should be paid"; and secondly, that it is the general practice of railroads and other companies "To include liability insurance as part of the cost."

Without discussing the matter at length, we are of the opinion that neither of these considerations alters the situation so far as regards the legal liability of the City to make good to the contractor what he has paid for liability insurance, under the contract as it is written.

We would suggest, however, that the matter might be referred to the Finance Committee of the Council. Upon the facts, as stated by the Commissioner of Public Works, the claim of the contractor to be reimbursed such sum as he has actually expended on liability insurance, not exceeding $7\frac{1}{2}$ per cent., seems to be a just claim; and there is no good reason why the Finance Committee may not order this claim paid if it

is satisfied, upon the facts, that the provision for such payment was omitted from the contract by mistake.

Respectfully submitted,

WILLIAM DILLON,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

DECEMBER 19, 1911.

HON. JOHN E. TRAEGER, City Comptroller.

Dear Sir:

Replying to your your inquiry of December 5, 1911, as to whether the Board of Trustees of the Firemen's Pension Fund may invest moneys that are not needed for immediate use in interest bearing securities, or whether, by the terms of Section 4 of the Firemen's Pension Act, all moneys up to \$200,000 must be held in cash in the city treasury, I have the honor to advise you that said Board of Trustees are specifically empowered to invest the Firemen's Pension Fund or any part thereof, without limitation, except as is prescribed in Section 5 of an Act entitled "An Act to create a Board of Trustees of the Firemen's Pension Fund," etc., approved May 13, 1887, in force July 1, 1887, as amended by an Act approved June 1, 1907, in force July 1, 1907, (Hurd's Revised Statutes, 1909, 431). Said Section 5 is as follows:

"The said board of trustees shall have power to draw such pension fund from the treasury of such city, village or incorporated town and may invest such fund, or any part thereof, in the name of the 'Board of Trustees of the Firemen's Pension Fund,' in interest-bearing bonds of the United States, of the State of Illinois, of any county of this state, or of any township or of any municipal corporation of the State of Illinois. And all such securities shall be deposited with the treasurer of said city, village or incorporated town as *ex officio* treasurer of said board, and shall be subject to the order of said board."

The foregoing section is not in any way limited by Section 4, referred to in your communication. Said section pro-

vides that when the sum of \$200,000 shall be received and accumulated, it shall be retained as a permanent fund, and thereupon and thereafter the annual income of such fund and any excess thereof shall be available for the uses and purposes of such pension fund.

Yours very respectfully,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

DECEMBER 20, 1911.

HON. CARL T. MURRAY, Chairman, Sub-Committee on Health.

Dear Sir:

Your request of the 6th inst., for the draft of an ordinance regulating laundries has been considered by this department together with the copies of ordinances in force in other cities which accompany your communication.

Since the first day of July, 1911, the City Council has the *power to direct the location and regulate the use and construction of laundries.* (Subdivision 82, Section 1, Art. V, Cities and Villages Act.)

Prior to said date the City Council possessed the power to compel the owner of any unwholesome or nauseous house or place, to cleanse, abate or remove the same, and to regulate the location thereof. (Subdivision 84 of Section 1, Art. V, Cities and Villages Act.)

Section 712 of the Chicago Code of 1911 makes it unlawful to locate, build, construct, or maintain on any lot fronting on any street or alley in any block in which one half of the buildings on both sides of the street are used exclusively for residence purposes, or within fifty feet of any such street, any building or place used for a laundry to be run by machinery, etc., without the written consent of a majority of the property owners according to frontage on both sides of such street or alley.

Under the provisions of the City Charter the City Council

may pass an ordinance uniform in effect on all laundries by which it prescribes:

- I. Where laundries may be located and upon compliance with what conditions.
- II. That no room or place used as a laundry may be used as sleeping, cooking and living quarters.
- III. How laundries shall be constructed.

This would bring into play the property owners or residents or voters of a given neighborhood, the department of buildings, the health department and possibly the fire department under Subdivisions 63 and 65, of Section 1, Art. V, Cities and Villages Act.

The word regulation necessarily includes the word inspection and the payment of an inspection fee to any one or all of the above departments.

The ordinances submitted by you can be used as a basis for such an ordinance in the City of Chicago.

In this connection it should be remembered that in California and Oregon, cities are invested with larger powers or regulation, in this regard. We must follow the provisions of our charter and the decisions of the Supreme Court which have defined the limitations within which the City Council must exercise its powers.

The particular matter submitted by you is now under discussion by the commission recently appointed by his Honor, the Mayor, to devise ways and means for the protection of residence districts against the encroachment of manufacturing and other business establishments.

I would therefore advise you to consult with Alderman Beilfuss, the chairman of said commission on the subject.

Very truly yours,

NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

DECEMBER 20, 1911.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Your communication of the 11th inst., requesting an opinion as to whether the recently passed ordinance requiring the closing of pool and billiard rooms and bowling alleys at 1 o'clock a. m., applies to billiard rooms and bowling alleys operated by clubs such as the Chicago Athletic Club and others of the same character, has been referred to me for reply.

The ordinance in question was passed November 20, 1911, and appears on pages 1751 and 1752 of the Council Proceedings of that date. The first paragraph of the ordinance is as follows:

"Section 1. That no person shall keep open any billiard or pool room, or any bowling or pin and ball alley, or any room or place within the city, where any billiard or pool table or any bowling or pin and ball alley is kept, used or operated for profit, between the hours of one o'clock a. m. and five o'clock a. m."

It will be observed that the ordinance relates only to rooms or places kept, used or operated *for profit*.

Clubs such as the Chicago Athletic Club are commonly organized under the general incorporation laws of the State of Illinois as corporations not for pecuniary profit, for purposes of social pleasure, recreation, the promotion of sports, and the like.

Many such clubs maintain one or more billiard or pool tables and bowling alleys. Such tables and alleys are for the exclusive use of members and their guests and are merely incidental to the main purpose of the club. Members are usually charged for the use of the tables or alleys, but generally the charge is no more than necessary to pay for the service and the maintenance of the room or alley.

The statute relative to corporations not for pecuniary profit, provides that no dividend or distribution of the property of such corporation or association shall be made until all debts are fully paid and then only upon its final dissolution and surrender of organization and name. Such clubs gen-

erally derive their chief revenue from initiation fees and dues of members.

An ordinance in regard to licensing billiard and pool tables and bowling alleys has been in force for some years. Said ordinance among other things provides (Sec. 167 of the Chicago Code of 1911) that:

“No person shall have, keep or conduct *for profit* within the city any billiard or pool table, bowling or pin and ball alley, without first obtaining a license therefor, * * *.”

I am informed that clubs of the character above mentioned have never been required by the city to take out licenses for billiard or pool tables or bowling alleys maintained by them.

I am of the opinion that billiard and pool rooms and bowling alleys kept by clubs of the character above mentioned and operated under the conditions above stated, are not kept, used or operated for profit within the meaning and intent of the ordinance, and that the ordinance does not apply to such rooms and alleys.

Yours respectfully,

BRYAN Y. CRAIG,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

DECEMBER 20, 1911.

HON. EDWARD COHEN, City Collector.

Dear Sir:

Your letter asking for an opinion on the right of a party to make sales of liquor for delivery under licenses authorizing both retail and wholesale dealing therein, to which was attached a communication from Messrs. Ringer, Wilhartz & Louer, attorneys for such party, was referred to me for reply.

The letter of the attorneys contained inquiries so general and sweeping in their nature, that I found it necessary to require them to state their questions in more concrete form. Otherwise I would have been obliged to interpret all the liquor

laws of the territory annexed to the original City of Chicago, as well as the ordinances relating to the sale of liquor, and to go into many questions which do not require an answer at this time.

Thereupon the parties making the inquiries told me to eliminate all questions arising out of the local ordinances of such annexed territory, also all questions relating to the proper conduct and maintenance of the place of business, or any impropriety or irregularity in the manner of obtaining orders. Stripped of these features, the two questions asked may be stated as follows:

1. Has a person who holds a dramshop license but who maintains no bar and neither gives away nor sells drinks to be consumed on the premises, a right to accept orders at his place of business (irrespective as to how they are received at the place of business) for liquors in quantities of less than one gallon to be delivered at any place in the city where there is no local restriction on the sale or delivery of same?

2. Has such person, if he also holds a wholesale liquor dealer's license, a right to solicit orders and deliver liquors in quantities of one gallon or over in any part of the city where no local law interferes?

In regard to the first question, it should be noted that while Section 1525 of the Code requires a liquor dealer who runs no bar to take out a dramshop license if he sells liquors in less quantities than one gallon, it recognizes the distinction between a place where liquor is consumed on the premises and other places like grocery stores, department stores and liquor stores where it is only sold but not consumed on the premises.

This distinction is emphasized in Section 1540, where the two classes are given privileges of a different kind. In fact, while most of the provisions of the article relating to Saloons and Dramshops include all places licensed as dramshops, the distinction is not lost sight of, and several other sections clearly draw the distinction.

Section 1527 of the Code prohibits either of these classes from selling, giving away or otherwise disposing of liquors at any other place than the place described in the license. Section 1540 prohibits both classes from soliciting orders for

sale or delivery, also from selling, offering for sale, or delivering, liquor in quantities less than one gallon at any other place than the place specifically described in the license. Then follows a proviso, as follows:

“* * * provided, that nothing herein contained shall be held to prevent any person conducting or maintaining a grocery store, department store, liquor store or other place licensed as a dramshop, where intoxicating liquor is not consumed or permitted to be consumed upon the premises, from soliciting and taking orders at such grocery store, department store, liquor store, or other place, from any person, and from making deliveries in the city pursuant to such orders.”

Applying the well-known rule of construction, that all parts of these ordinances must be interpreted with relation to each other so as to give effect to every part thereof, we cannot infer that Section 1540 is either a repetition of the clause referred to in Section 1527, nor that the proviso is intended to conflict with it. Hence, we must interpret the various provisions referred to above to mean: first, that the keeper of a dramshop cannot, under his license, set up a branch or undertake to do business by running a saloon or dramshop at any other place than the place described in his license; second, that he must not solicit orders for less than one gallon at any other place either to be called for by the person buying or to be delivered to him; third, that even if he does not solicit orders, he cannot, if he runs a place where intoxicating liquors are consumed or permitted to be consumed on the premises, sell or request, or offer for sale or deliver, in quantities of less than one gallon except at his regularly licensed place; fourth, that, in case he holds a dramshop license but conducts a grocery store, department store, liquor store or other place where intoxicating liquor is not consumed or permitted to be consumed on the premises, he may solicit and take orders for less than one gallon of same at his place of business and deliver such orders within the city where no local law interferes.

As to whether a person conducting such a place as last mentioned has the right to fill such orders no matter how they are obtained provided they are received at the place of business, that question is altogether too broad, even after eliminat-

ing questions of conduct and maintenance and I do not undertake to say more on that point than that such orders may be taken at the place of business by the proprietor of same or his wife or female relative residing with him, or by a male clerk or agent in his employ, or in case the orders come in by mail or through messengers. It does not include the privilege of soliciting orders, in person or by agent, elsewhere than at the place of business.

I do not consider the mailing or distribution of circulars, or any other legitimate form of advertising as coming within the prohibited solicitation of orders. (*Ex parte* Siebenhauser, 14 Nev. 369.)

If there is any particular method of obtaining orders that has been objected to which I have not mentioned herein, I do not wish to be understood as expressing an opinion as to the legality of the same.

As to the second question, relating to sales of one gallon or more, a party who holds a license as a wholesale spirituous liquor dealer has a right to solicit such orders and to deliver same, if no local law interferes.

The only thing that could give rise to doubt on this point, so far as I can see, is the clause in Section 1563 of the Code, which provides for the issuance of such a license and says that it shall authorize the licensee "to sell and offer for sale within the city, spirituous liquor in quantities of one gallon or more at a time, at the place of business specified in the application and not elsewhere."

By reference to Section 1540 of the Code it will be found that solicitation, sale and delivery of liquor at any other place than the place described in the license is limited only in case of sales of less than one gallon. Again, Section 1565 prescribes certain requirements for the delivery wagons of such licensed wholesale dealers, and it would be absurd to assume that there was a restriction on such deliveries by wagon in the face of such provisions. There are other sections which might be mentioned which indicate that such solicitation and delivery in the case of a wholesale dealer is contemplated.

The clause from Section 1563 quoted above, therefore, must be understood to mean that the licensee has a right to

carry on his business only at the place specified but is not prohibited from soliciting orders and delivering same elsewhere.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

DECEMBER 20, 1911.

HON. JOHN E. TRAEGER, Comptroller.

Dear Sir:

The above matter, submitted to this department with the communication of Joseph F. Peacock, Esq., City Real Estate Agent, of the 7th inst., presents for consideration the following questions:

1. The powers of the town of Jefferson under the Township Organization Law of 1851, with reference to acquiring and holding real estate for town purposes.

2. The manner in which the real estate was acquired upon which the Town House or Town Hall was erected and correlated to this, a construction of the deed of John Gray to the Town of Jefferson of the land in question, October 2, 1857, with the following defeasance clause:

“This conveyance is made, understood and agreed by and between the parties hereto, upon the express condition that the premises conveyed shall be occupied, used and enjoyed for Town purposes only, and upon ceasing to be so used and enjoyed by said party of the second part in whole or in any part thereof, the conveyance above becomes and remains absolutely void and of no longer force, effect or obligation as against the said party of the first part, his heirs or assigns.”

3. The effect upon this deed of the Act of the General Assembly in force January 30, 1857, entitled: “An Act to authorize the Town of Jefferson in Cook County to build a town house, and to levy a tax therefore.”

4. The effect of the Act of the General Assembly in force March 27, 1869, entitled “An Act to incorporate the Town of Jefferson in the County of Cook and State of Illinois.”

5. The effect of the Act of the General Assembly in force July 1, 1872, entitled "An Act to provide for the incorporation of cities and villages," which was adopted by said town at an election held August 6, 1872.

6. The effect of the Act of the General Assembly, in force April 25, 1889, entitled "An Act to provide for the annexation of cities, incorporated towns and villages, or parts of same, to cities, incorporated towns and villages," under the provisions of which said village was later on annexed to and became a part of the City of Chicago.

7. The effect of the act under which township organizations within the City of Chicago have ceased to exist.

8. The effect of the decree of the Circuit Court in the case of the *Town of Jefferson v. The City of Chicago et al.* (B. R. No. 561).

Township organization of Counties in Illinois had its origin in the Constitution of 1848. (Art. 7 and 9.)

Pursuant to its provisions the General Assembly at its session in 1851 passed a law providing for township organization.

As contemplated by the constitution, a township is a territorial subdivision of a county for purposes of local government.

The Constitution of 1870 has retained among its provisions the township organization form of local government and recognizes counties, cities, townships and school districts as municipal corporations. (Art. 4, 9 and 10.)

Following the passage of the law of 1851 Cook County adopted the Township form of local government, and the territory, since then successively known as the Town, Incorporated Town and Village of Jefferson was formed under the provisions of the Act in question.

Being the primitive form of local government in counties, the powers exercised by the town, as a corporate body, were necessarily limited.

Among these powers are the right:

2. "To purchase and hold lands within its own limits and for the use of its inhabitants, subject to the power of the General Assembly."

4. "*To make such orders for the disposition, regulation or use of its corporate property, as may be deemed conducive to the interests of its inhabitants.*"

By the Act of January 30, 1857, *the town was authorized to receive as a donation a lot and erect a building thereon to be used for town meetings and for such other public purposes as the trustees of the town house, whose election is provided for in the act, may authorize.*

This Act was passed to enable the town to receive the donation by deed of October 2, 1857, and the latter instrument must be construed in the light of the provisions of the Act in question. After the deed had been obtained, the town house was built and occupied by the local authorities of said town.

By the Act of March 27, 1869, the inhabitants and residents of the Town of Jefferson were constituted a body politic and corporate under the same name, *with the power*, among others, *to purchase, receive and hold property*, real and personal, within the town limits. The exercise of the corporate powers, which were largely increased, was vested in a Board of five Trustees.

It may be stated as a fact that thereafter the local authorities of the incorporated town received the town hall property and occupied the same for town purposes.

And it may also be stated as a fact that after the town became the Village of Jefferson, in August, 1872, the Village Authorities received from the authorities of the incorporated town said town hall property and occupied and used the same for village purposes until the annexation of the Village of Jefferson to the City of Chicago, when said property was turned over to the authorities of the City of Chicago, who since then have occupied and used the same as a police station.

It is unnecessary here to make more than passing reference to the provisions of the Cities and Villages Act, but for your guidance I have deemed it best to transmit herewith a copy of the pertinent provisions of all the successive Acts of the General Assembly which have been mentioned herein.

It will thus be seen that from the primitive provisions of the Act of 1851 and its various amendments the town has passed by successive stages to its present status as an integral

part of the larger and more perfect local government of the City of Chicago.

The fact that the original town organization no longer exists may be disregarded in view of the provision of Section 12 of Article I of the Cities and Villages Act, which vests all rights and property held by any municipal corporation in the same municipal corporation after it becomes incorporated under the provisions of the latter Act.

By the terms of the Annexation Act all corporate property, upon annexation, vests in the municipality to which a town or village has been annexed.

The decree of the Circuit Court vested the title to this property in the Town of Jefferson, the original grantee, who received and held the same under the provisions of the Acts of 1851 and 1857 and the deed of John Gray. Since said Town organization by various stages of legislation, has finally become merged in the City of Chicago, said City, as the successor of the former grantee, is authorized to and does occupy and use said property for a public or municipal purpose, to wit: a police station.

The deed must be held to be a dedication of property to public uses by which an easement is created, which cannot be destroyed by an abandonment, sale or use for any other purpose by the City without the operation of said defeasance clause in favor of the heirs of John Gray.

I am, therefore, of the opinion that the possession of the premises by the City of Chicago cannot be attacked with success by said heirs, until the City by some act shall render operative the defeasance clause in said deed.

Very truly yours,

NICHOLAS MICHELS,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

DECEMBER 21, 1911.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Under date of December 16th you requested of this department an opinion relative to frontage consent requirements for bathing beach permits.

Section 161 of The Chicago Code of 1911 controls the issuance of such permits. Under this Section in addition to other requirements,

“where two-thirds or more of the buildings situated within 1,000 feet from the nearest point in any boundary line of such places are used for residence purposes and where a bathing, fishing or boating beach has not been actually carried on and conducted under a license issued by the City of Chicago for the year ending April 30, 1909, or a portion thereof”

it is necessary that the applicant present to the Mayor with the application and certificate required,

“the written consent to the location of such beach of a majority of the property owners according to frontage on both sides of all the streets around the block in which such beach is to be conducted and shall also present the written consent to the location of such beach of a majority of the *bona fide* householders living within 1,000 feet from the nearest point of any boundary line of such place where it is proposed to carry on and conduct such boating, fishing or bathing pier.”

On September 25, 1911, Alderman Britten presented the following order, which was on motion duly passed:

“Ordered, That the City Collector be and he is hereby directed to refuse the issuance of a license for the operation of any and all public bathing beaches (except municipal beaches) on the ‘North Side’ of Chicago along the Lake Shore, where said applicant cannot comply with Section 161 of ‘The Chicago Code of 1911.’ ”

On December 11, 1911, Alderman Britten presented an ordinance amending Section 161 which was referred to the Select Committee on bathing beaches and recreation piers. The present Section exempts beaches from obtaining the frontage consents that were conducted under a city license for the year ending April 30, 1909. By the amendment it is

intended to embrace *all* beaches by striking from the Section the following:

“And where a bathing, fishing or boating beach has not been actually carried on and conducted under a license issued by the City of Chicago for the year ending April 30, 1909, or a portion thereof.”

Construing your communication also as a request for an opinion as to the validity of frontage consent requirements in the present ordinance, we submit the following conclusions.

In our opinion an ordinance which discriminates in favor of certain persons as against others of the same class or exempts a certain class of persons from the operation of the ordinance and includes others of the same class is invalid and ineffective.

It was held in *City of Cairo v. Feucher*, 159 Ill. on page 155:

“A city ordinance which unjustly discriminates between persons coming within the same class and imposes burdens on some from which others are, by its terms, exempt, is void.”

It has been held that a city ordinance providing a fee for the licensing of *wholesale* liquor dealers, which, by its terms, does not apply to persons having a *retail* liquor license under another ordinance of the city, is unjust, unreasonable and void.

In *Tugman v. City of Chicago*, 78 Ill. the court held on page 405:

“An ordinance which prevents one citizen engaging in a particular kind of business in a certain locality under a penalty, whilst another is permitted to engage in the same business in the same locality, is not only unreasonable, and therefore void, but its direct tendency is to create a monopoly, which the law will not tolerate.”

It is extremely doubtful that under the decisions quoted and others rendered by our Supreme Court that Section 161 would be upheld in its present form. The amendatory ordinance removes the objection that our Supreme Court makes to such an ordinance.

The last legislature in amending the Cities and Villages

Act gave to the municipality the specific power "to direct the location and regulate the use of bathing beaches."

Under this direct power the municipality could pass most any ordinance relative to frontage consents.

Very truly yours,

HENRY A. BERGER,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

DECEMBER 22, 1911.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF CHICAGO.

Gentlemen:

Pursuant to the order of your Honorable Body of December 4, 1911, this department has made investigation of the above matter and begs leave to report the results thereof.

1. The plat of the original subdivision of the northwest quarter of Section 19, Township 38, north, Range 14, recorded October 9, 1867, shows the right of way of the Chicago, St. Louis & Pittsburgh Railroad Company through said land as one hundred feet wide, with a street fifty feet wide on either side.

2. This subdivision having been vacated February 16, 1870, the plat of Vail's Subdivision of the north half of said Section 19 was recorded March 1, 1870. This plat shows the right of way of said Railroad Company through said lands as of the same width, with a street thirty feet wide on either side, marked "Leavitt Street." The "Leavitt Street" shown along the west of said right of way is the strip of land thirty feet in width, here in question.

3. April 5, 1888, the Board of Trustees of the Town of Lake passed an ordinance which, after setting forth in a preamble that it was thereby intended to forever settle the rights of said Town and the Chicago, St. Louis & Pittsburgh Railroad Company in the premises, ordained:

"The Town of Lake hereby recognizes and grants the said Chicago, St. Louis and Pittsburgh Railroad Company the

right to lay within the limits of its said right of way extending north and south through the west half of Sections 6, 7, 18, 19, 30 and 31, in said Town of Lake and over and across all streets and alleys now or hereafter opened across the same whatever main tracks, etc., said company now or at any time hereafter may desire to construct and maintain upon said right of way." * * *

The tracks now maintained and operated upon this right of way by the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, the successor of the Chicago, St. Louis & Pittsburgh R. R. Company, were laid by authority of this ordinance and run along the east line of the strip of land here in question.

4. July 20, 1891, the City Council of the City of Chicago passed an ordinance, entitled "An ordinance providing for the erection of viaducts over the tracks of the Chicago & Northern Pacific Railroad Company at Taylor street, Fourteenth street bridge and Ogden avenue and the vacation of certain streets."

Section 5 of said ordinance provides as follows:

"That the obligations imposed upon and the privileges granted to said Chicago & Northern Pacific Railroad Company as the successor of the Chicago & Great Western Railroad Company (formerly known as the La Salle & Chicago Railroad Company), by an ordinance * * * passed May 13, 1872, and the ordinance amendatory thereof, passed May 11, 1885, are hereby declared to be in full force and effect to the southern limits of the City of Chicago, as they now exist, but upon the same provisions and conditions as are contained in the ordinance as amended." * * *

By virtue of annexation in 1889, the rights granted by this ordinance extended to the then southern limits of the city.

The right of way acquired and the tracks laid in pursuance of the provisions of said ordinance run along the west line of the strip of land here in question and are now operated by the Baltimore and Ohio Chicago Terminal Railroad Company, as the successor of the Chicago Terminal Transfer Railroad Company, which had acquired the franchises and rights of the Chicago and Northern Pacific Railroad Company, July 1, 1897.

A concise history of these various grants is given in the case of the *Chicago Terminal Transfer Railroad Company v. The City of Chicago et al.*, 220 Ill. 310.

5. December 24, 1908, the City of Chicago, through its Commissioner of Public Works, leased this strip of land shown on the plat as "Leavitt Street," to the Knickerbocker Ice Company for the term of one year, at a rental of \$152.14. This lease is on file in the office of the Bureau of Compensation.

While it is the law that a municipal corporation can not permit or sanction the use of a public street for private purposes to the exclusion of the public and this lease, therefore, was unauthorized and void, I am, nevertheless, of the opinion that the act of the City is sufficient as an acceptance of the original dedication, and that the rights of the City to this strip of land, for purposes of a street, can not now be questioned.

Very truly yours,

NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

DECEMBER 26, 1911.

HON. G. B. YOUNG, Commissioner of Health.

Dear Sir:

Your inquiry of the 21st inst., with reference to the above matter, brings up for our review the following laws of the State and City:

1. By paragraphs 50, 53, 66 and 78 of Section 1, Art. V, Cities and Villages Act, the City Council has power

"To regulate the sale of meats, poultry, fish, butter, cheese, lard, vegetables, and all other provisions, and provide for place and manner of selling the same."

"To provide for and regulate the inspection of meats, poultry, fish, butter, cheese, lard, vegetables, cotton, tobacco, flour, meal and other provisions."

"To regulate the police of the City or Village, and pass and enforce all necessary police ordinances."

“To do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease.”

2. The ordinance of the City of Chicago, which provides that no milk, cream, etc., shall be sold in the City of Chicago, unless the same has been obtained from cows that have given a satisfactory negative tuberculin test within one year.

“Provided, however, that from January 1, 1909, *
* * until January 1, 1914, milk or cream, etc., obtained from cows not tuberculin tested, or *not free from tuberculosis*, may be sold within the City of Chicago, if the milk or cream from said cows is pasteurized according to the rules and regulations of the department of health.”

(Sec 1273, Chicago Code of 1911.)

3. “An Act to prohibit the establishing and enforcing of the tuberculin test for dairy animals by any city, village, incorporated town, county or other corporate authority in the State of Illinois,”

passed by the General Assembly at its last session.

This law invalidates every ordinance, rule or regulation adopted by a municipal corporation, prescribing the tuberculin test for cows.

It is not necessary here to call attention to the almost uniform decisions of our courts upon the extent and the limitations of the police power, hedged in as they are and should be by the constitution of the State and of the United States.

From a careful perusal of the laws cited you will readily come to the conclusion that I have arrived at, namely, that your department is vested with ample powers to promote health and suppress disease within the city.

However, since the General Assembly has seen fit to make unlawful the test upon the living animal, that method must now be eliminated from your powers of inspection and regulation. Hereafter, in following the charter powers of the city and the ordinance in question, it will be the duty of your department, by an inspection of the product of the cow arriving in the City of Chicago, for sale to its inhabitants, to determine whether or not it is free from tubercular germs.

It is, therefore, my opinion that your department is not vested with power by said ordinance, to refuse the application

of any person, firm or corporation for a milk dealer's license on the bare assumption that the milk offered for sale by such dealer comes from cows *not free from tuberculosis*.

It is further my opinion, that whenever an inspection of the product received by any dealer, for sale in the City of Chicago, shows the presence of tubercular germs, it is the duty of your department as the conservator of the public health of the inhabitants of the City, to prevent the sale of such product, until it has been pasteurized as prescribed by said ordinance.

Very respectfully,

NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

DECEMBER 26, 1911.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

Replying to your communication of December 21, 1911, we beg to advise you that you cannot legally conclude a contract based upon plans not embodied in or referred to in your bid.

On the other hand there is one or more methods by which proposals can be had on plans prepared by engineers other than those in the employ of the City. In order to effectuate your desire in this particular you might adopt any one of three methods which we shall take up and discuss in turn.

(1) The City's Engineering Department might prepare plans for a bridge and invite proposals thereon, and at the same time invite proposals upon a plan to be prepared and submitted by the bidder. Then after the opening of bids you could reject all of them and report your action, together with the various plans and bids thereon to the City Council, with a recommendation as to what, in your judgment, it is advisable for the City to do, and thereupon the City Council might, by a two-thirds vote, direct you to enter into a contract without advertising for bids, in accordance with a plan and bid thereon

which you had reported to the Council in the manner above referred to.

Council action in this particular is rendered necessary by Section 116-A, Article 9, Hurd's Revised Statutes, 1908, as amended by the Legislature (Session Laws 1911, page 185), which section as now amended reads:

"Sec. 50. Any work or other public improvement, except any work or public improvement to be paid for in whole or in part by a special assessment shall, when the expense thereof shall exceed \$500, either be constructed by contract let to the lowest responsible bidder in the manner prescribed by ordinance; Provided, however, any such contract may be entered into by the proper officers without advertising for bids, by a vote of two-thirds of all the aldermen or, trustees elected; or such work or other public improvement shall be constructed in the following manner, by a vote of two-thirds of all the aldermen or trustees elected, to wit:

The commissioner of public works or other proper officers to be designated by ordinance, shall superintend and cause to be carried out the construction of such work or other public improvement and shall employ for the performance of all manual labor thereon, exclusively laborers and artisans whom the city or village shall pay by the day or hour, and all material of the value of \$500 and upward using in the construction of such work or other public improvement, shall be purchased by contract let to the lowest responsible bidder in the manner to be prescribed by ordinance.

In every city which has adopted an Act entitled, 'An Act to regulate the civil service of cities,' approved and in force March 20, 1895, every such laborer and artisan shall be certified by the civil service commission to the commissioner of public works or other proper officer, in accordance with the requirements of said Act entitled, 'An Act to regulate the civil service of cities.' "

This same method of procedure is also rendered necessary by Sections 50 and 2104, of the Chicago Code of 1911, which are as follows:

"50. All contracts for work, material, or supplies of any kind or nature, let by an officer of the city, where the amount of such contract exceeds five hundred dollars, shall be let to the lowest responsible bidder, after advertising the same. All such contracts before becoming of

any effect shall be approved and countersigned by the comptroller.

Advertisements shall be made and bids submitted and received by the proper officer in the same manner as is provided for the letting of contracts in and by the provisions of this ordinance concerning the letting of contracts by the department of public works."

"2104. All contracts, when the expense thereof shall exceed the sum of five hundred dollars, shall be let to the lowest responsible bidder, after advertising the same for at least ten consecutive business days, except as may be otherwise provided by law, and shall be approved by the mayor; but any such contract may be entered into by the commissioner of public works without advertising for bids and without such approval, by a vote of two-thirds of all the aldermen elected. No contract shall be made relating to any of the matters within the cognizance of the department of public works unless the same shall have been authorized by the city council. No contract for coal or for any other supplies, for which said commissioner may be authorized to contract, shall be let for a period extending beyond the end of the current fiscal year; but in cases where the said commissioner shall deem it necessary for the administration of any department, the right may be reserved to the City of Chicago in any such contract to extend the operation of the same for a further period of not to exceed six months. Such right to be exercised by the city council."

(2) You might advertise for bids on plans and specifications prepared by the City, and at the same time invite bids on plans to be furnished by the bidder, and if, in your judgment, some plan furnished by some bidder should be preferable to that prepared by the City, you could then reject all bids and re-advertise for bids on the preferable plans and specifications prepared by and bid on by the bidder as aforesaid, and thereupon award the contract to the lowest responsible bidder.

(3) You might before advertising for bids, solicit the submission of plans to be prepared by persons other than those employed by the City and advertise for bids upon plans so submitted together with any that might be prepared by the City, and if competitive bidding was thereby obtained, let the contract to the lowest responsible bidder on plans and specifications which you should, after the bidding, determine should be employed in the construction of the bridge in question.

This latter plan is one in which the element of doubt as to its legality is not altogether lacking, but after a consideration of the authorities, we are of the opinion that a contract concluded in this manner could be sustained.

The authorities are uniform in holding that the object of a statute or ordinance, such as that to which we have above referred, is to give the public the benefit of competitive bidding on a contract before it is let. In a sense it therefore seems the competition would be far greater if a number of plans were before the bidders upon which they might submit bids, as in that way there would be competition both in design and the amount of the bid thereon in each instance.

The only case in this State in which the identical question was considered and passed on, is *Sanitary District of Chicago v. Lee*, 79 Ill. App. 159, wherein the decision in reality turns on other points. The opinion in that case is written by Justice ADAMS. In that case, at page 169, Justice ADAMS says:

“We are of the opinion that the spirit and intent of Section 11 of the act is that the Sanitary District shall so advertise the work to be let and invite proposals therefor, that nothing will be left to the discretion of the trustees, after the bids shall have been received, except to determine who is the lowest responsible bidder. The question who is the lowest bidder is determinable by a mere inspection of the bids, and involves no exercise of discretion, but only a comparison of figures. The bidder who has offered to do the work for the smallest sum is the lowest bidder, and as among bidders equally responsible, the work cannot lawfully be awarded to one who is not the lowest bidder.

The Supreme Court has reprobated, in no uncertain terms, the reservation of the decision of any matter material to a public work until after the making of a special assessment for the work, or the reception of bids for the contract. *Foss v. City of Chicago*, 56 Ill. 354, was an appeal from a judgment for a special assessment. The ordinance under which the assessment was levied provided that a certain street should ‘be curbed with curb walls, filled and paved with wooden blocks, *excepting such portions of the above described work which have already been done in a suitable manner,*’ thus reserving to the city authorities the determination of what part of the work had been done ‘in a suitable manner,’ instead of

determining in the first instance the exact work to be done. The court held that this reservation vitiated the assessment * * *."

But it will be noted that in so far as special assessments are concerned, the law requires that the responsibility of prescribing what improvements shall be made and the manner and the extent thereof, is imposed upon the City Council. (*Foss v. City*, 56 Ill. 354), and the court might well hold that by virtue of the law in that particular, a contract for work to be done and paid for by special assessment, could not be made except upon bids submitted pursuant to plans and specifications, every detail of which was embodied in the ordinance which, in every case, must be the foundation of a special assessment proceeding, without leaving any discretion or latitude of action to the contract making power, but that on the other hand, where the power to determine the nature of the improvement and that of making the contract is vested in one and the same person, as it is vested in the commissioner of public works with reference to contracts for the construction of bridges, then the commissioner of public works could, after inviting bids on a number of plans, determine which plan he would adopt and accept the bid of the lowest responsible bidder thereon. This distinction evidently was not called to the attention of the Appellate Court in the Lee case, and we are constrained to believe that had it been, different language would have been employed by the court in its opinion.

But it will be noted that in reality that case does not turn on the question which we are now discussing, and that in fact, so far as the particular question we are discussing is concerned, two of the three justices then constituting the Appellate Court, entertained opinions contrary to those expressed by Justice Adams, which they expressed in separate opinions in that case.

Justice WINDES, at page 117, says:

"I concur in affirming the order of injunction, but am of opinion that while it is a proper subject for decision, it is not necessary to the decision of this case to decide, as is done by Justice Adams in his opinion, that it was the duty of the Sanitary District trustees to decide, in advance of an advertisement for bids, that they would

build a bridge according to one particular design and advertise for bids on that design alone. As to whether this was the duty of the trustees I am in doubt, and do not therefore assent to that part, though I concur fully in the remainder of the opinion.

Had the advertisement made it clear that the trustees sought bids upon each of the Strobel, Scherzer and other designs, clearly and specifically described, so that all bidders could tell what design and all the designs there were open to competition, and which were accompanied by plans and specifications applicable to each of such designs, and also made clear that designs as well as bids were in competition, then I am inclined to the view that there would have been much fuller and fairer competition than was given by the advertisement in this case."

In this case Mr. Justice SEARS also wrote an opinion in which, at page 179, he says:

"If the board had, before advertising for bids, accepted a design as the best and most suitable, even though its adoption limited the scope of competition to one or two persons who were capable of complying with its terms, yet, in the absence of fraud, such choice would not be held illegal on the ground that it afforded opportunity for favoritism. *In re Dugro*, 50 N. Y. 515.

The contention of appellee is, however, that though such choice of design is within the control of the board before the advertising for bids, yet it can not be within their control after the taking of bids. If this is so, it can not be because of any possibility of favoritism in choice of design, but must be solely because it operates to limit the competition required. In the case here the contract was let to the Scherzer Bridge Company, and the design chosen was that known as the Scherzer design.

There was absolutely free competition afforded to bidders upon this design. With the advertised invitation to bid, complete plans and specifications were submitted, in accordance with which the contract was finally let. Every one who read the advertisement knew that the Scherzer design might be accepted, and every one had opportunity to bid upon the plans and specifications of that design."

Mr. Justice SEARS then proceeds to review a number of the cases cited in support of the contention that the determination as to design must be made before the taking of bids, and continuing at page 181, he says:

“No one of these cases referred to holds that if there be free and open opportunity to bid upon the design ultimately accepted, and if the plans and specifications of such design are submitted to the bidders, the choice of the design might not be as well made after as before the taking of bids. Nor am I able to find any authority to the effect that, under such circumstances, the particular one of several designs contemplated must be selected by the board before submitting the several designs, with plans and specifications thereof, to bids. There is, however, very respectable authority to the contrary. 1 Dillon on Municipal Corporations, Sec. 486; *Attorney-General v. Detroit*, 26 Mich. 262; *City v. Hosmer*, 79 Mich. 384; *State v. Birkhauser*, 37 Neb. 521; *Gilmore v. City of Utica*, 131 N. Y. 26.”

Siegel v. City, 223 Ill. 428; *City v. Mohr*, 216 Ill. 320; *City v. Mohr*, 114 Ill. App. 283; *People v. Kent*, 160 Ill. 655; *City v. Hanreddy*, 211 Ill. 24; *Sanitary District v. McMahon*, 110 Ill. App. 69, and *Pells v. City*, 176 Ill. 318, are all cases pertaining to the validity of municipal contracts and the formalities which are a prerequisite to the making thereof, but none of them, even remotely involve the subject-matter which we are now discussing.

Therefore, so far as we are to determine the law of this State, we are compelled to rely solely on what is said in the Lee case hereinbefore referred to, and the effect of that case is that two out of three of the Justices constituting the court, express the opinion that bids may be solicited on a number of plans and a determination of which plan shall be adopted made after the bids are received.

We, therefore, advise you that you may proceed in any of the three ways hereinbefore suggested in order to involve in the letting of contracts for bridges, a consideration of more than a single design.

Yours respectfully,

CHAS. M. HAFT,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

DECEMBER 28, 1911.

TO THE HONORABLE, THE MAYOR AND CITY COUNCIL OF THE
CITY OF CHICAGO.

Gentlemen:

At your meeting of December 11, 1911, the following order was adopted:

“Ordered, That the Corporation Counsel be and he is hereby directed to report to this Council at an early date what, if any, consequences will arise from the passage of the ward reapportionment ordinance with reference to the legal status of the aldermen now holding office.”

(Journal of Proceedings, page 1973.)

December 4, 1911, your honorable body passed an ordinance redistricting and dividing the city in to thirty-five wards (*Id.* page 1910).

By reason of the changes in the various ward boundary lines made thereby, we find the following conditions:

In the new first ward, Alderman Coughlin and Kenna, of the old first ward, and Alderman Shufelt of the old second ward now reside; the terms of Aldermen Coughlin and Shufelt expire in 1912, and the term of Alderman Kenna expires in 1913.

In the second ward Alderman Harding of the old second ward, and Alderman Tearney of the old third ward, now reside; the terms of both expire in 1913;

In the third ward Alderman Pringle of the old third ward and Alderman Parker of the old sixth ward now reside; the terms of both expire in 1912;

In the sixth ward Alderman Long of the old sixth ward and Alderman Nance of the old seventh ward now reside; the terms of both expire in 1913;

In the seventh ward Alderman Snow of the old seventh ward alone resides; his term expires in 1912;

In the eighteenth ward Alderman Healy and Brennan of the old eighteenth ward, and Alderman Murray and Stewart of the old twentieth ward now reside; the terms of Aldermen Healy and Murray expire in 1912 and of Alderman Brennan and Stewart expire in 1913;

In the twenty-first ward Alderman Geiger of the old twenty-first ward and Alderman Britten of the old twenty-third ward now reside; the term of Alderman Geiger expires in 1913 and of Alderman Britten expires in 1912; and there is also a vacancy caused by the resignation of Alderman Foell whose term would also expire in 1912;

In the twenty-second ward, Alderman Clettenberg of the old twenty-second ward alone resides; his term expires in 1912; and there is also a vacancy caused by the death of Alderman Bauler whose term would expire in 1913;

In the twenty-third ward Alderman Hey of the old twenty-third ward alone resides; his term expires in 1913;

In the thirty-fourth ward Alderman Ryan of the old thirty-fourth ward alone resides; his term expires in 1913;

In the thirty-fifth ward Alderman Donahoe of the old thirty-fourth ward alone resides; his term expires in 1912;

All the other wards of the city now have two aldermen residing in each of such wards respectively and in each of such other wards the terms of one alderman expires in 1912.

Having thus reviewed the complications caused by the passage of said redistricting ordinance, it becomes my duty under your order of December 11, 1911, to advise you of the legal effect of the same.

The questions presented for determination by your order are:

First: Does said ordinance affect the term of office of any alderman who now resides in a ward other than that particular ward he was elected to represent?

Second: Shall one alderman be elected at the city election next spring in each of the thirty-five wards of the city?

Third: Shall the vacancy caused by the death of Alderman Bauler (whose term would not have expired until 1913) be filled, and if so, how?

I will consider the questions thus presented in the order stated.

Section 3 of Article III of the Cities and Villages Act is as follows:

“Aldermen shall hold their office for the term of two years, and until their successors are elected and qualified.” (Hurd’s R. S. 1909, p. 339.)

The power to redistrict the city conferred upon the city council by Section 4 of Article IV of said Act, in my opinion, cannot be carried to the extent of vacating the office of any alderman.

It is, therefore, my opinion that the term of office of the sitting aldermen respectively is not affected by said redistricting ordinance.

Having so held, the second question above stated follows as a natural sequence.

Section 4 of Article IV of said Act, so far as is here material, is as follows:

“The city council of any city * * * may, from time to time, divide the city into one-half as many wards as the total number of aldermen to which the city is entitled; *and one alderman shall annually be elected in and for each ward, to hold his office for two years, and until his successor is elected and qualified; * * *.*” (Hurd’s R. S. 1909, p. 341.)

By authority of said section the city council *has* redistricted the city into thirty-five wards. It is now incumbent that one alderman shall be elected at the spring election of 1912 in each of said thirty-five wards for a full term of two years.

This provision of the statute is mandatory and not affected in any way by the passage of said redistricting ordinance or the complications created thereby.

Applying the foregoing conclusions to said complication we will find the following situation after the aldermanic election of next spring:

In the first ward, the terms of Alderman Coughlin and Shufelt expiring, and Alderman Kenna holding over, by the election of one alderman, the ward will have two aldermen;

In the second ward, Aldermen Harding and Tearney holding over, by the election of one alderman, the ward will have three aldermen;

In the third ward the terms of Alderman Pringle and Parker expiring, by the election of one alderman, the ward will have but one alderman;

In the sixth ward Alderman Long and Nance holding

over, by the election of one alderman, the ward will have three aldermen ;

In the seventh ward where Alderman Snow alone resides, and his term expiring, by the election of one alderman, the ward will have but one alderman ;

In the eighteenth ward, the terms of Alderman Healy and Murray expiring, and Alderman Brennan and Stewart holding over, by the election of one alderman, the ward will have three aldermen ;

In the twenty-first ward, the term of Alderman Britten expiring, Alderman Geiger holding over, and the term of Alderman Foell, lately resigned, expiring in 1912, by the election of one alderman, the ward will have two aldermen ;

In the twenty-second ward, the term of Alderman Clettenberg expiring and there being a vacancy caused by the death of Alderman Bauler whose term would not have expired until 1913, by the election of one alderman, the ward will have but one alderman ;

In the twenty-third ward, where Alderman Hey alone resides and he holding over, by the election of one alderman, the ward will have two aldermen ;

In the thirty-fourth ward, where Alderman Ryan alone resides and he holding over, by the election of one alderman, the ward will have two aldermen ; and

In the thirty-fifth ward where Alderman Donahoe alone resides and his term expiring, by the election of one alderman, the ward will have but one alderman.

From this it will be seen that the first, twenty-first, twenty-third, thirty-fourth and all the other wards of the city not affected by said redistricting so far as the election of aldermen is concerned, will each have two aldermen ;

The second, sixth and eighteenth wards will each have three aldermen ; and

The third, seventh, twenty-second and thirty-fifth wards will each have but one alderman.

This will make a total of sixty-nine aldermen in the city council.

If a special election is called to fill the vacancy caused by the death of Alderman Bauler whose term would not have

expired until 1913, the twenty-second ward will have two aldermen and bring the membership of the city council to its full quota of seventy.

In my opinion, however, it is not mandatory on the city council to fill a vacancy in the office of alderman.

Section 4 of Article III of the Cities and Villages Act is as follows:

“If any vacancy shall occur in the office of alderman by death, resignation, removal or otherwise, such vacancy shall be filled by election.” (Hurd’s R. S., 1909, p. 339.)

Section 14 of Article IV of said Act in so far as material, is as follows:

“* * * and in all cases, when necessary for the purposes of this act (the city council) may call special elections.” (*Id.* p. 342.)

Construing said two sections together, my conclusion is that any vacancy in the office of alderman, if filled at all, shall be filled by an “election,” which election shall be “a special election” and which the city council in its discretion *may* call. This conclusion is further sustained by the provisions of Section 13 of Article IV of said Act which reads as follows:

“If, for any reason, there shall not be a quorum in office of the city council or board of trustees, the mayor, clerk or any alderman or trustee, as the case may be, may appoint the time and place for holding a special election to supply such vacancy and give notice and appoint the judges thereof.” (*Id.* p. 342.)

My conclusions are:

(a) The terms of the sitting aldermen are not affected by the redistricting ordinance;

(b) One alderman should be elected in each of the thirty-five wards of the city at the spring election of 1912, and

(c) A special election may be called to fill the vacancy in the twenty-second ward caused by the death of Alderman Bauler.

If this course is adopted by your honorable body, it will, in my opinion, be a complete compliance with all statutory

requirements and a reasonable solution of the complications occasioned by the required redistricting of the city.

Respectfully submitted,

WM. H. SEXTON,
Corporation Counsel.

DECEMBER 30, 1911.

JOHN D. RILEY, Esq., Superintendent of Maps.

Dear Sir:

Your communication of December 27, 1911, in respect to whether the prohibition districts mentioned in the caption hereof were affected by the vote on the proposition "For dramshops" or "Against dramshops," held in certain portions of the former town of Cicero on April 4, 1911, has been referred to me for reply.

The vote on the proposition referred to, was taken under the provisions of Section 18 of the Annexation Act (Hurd's 1909, p. 376) and affected only liquor ordinances which were in force in the territory voting, prior to the annexation of such territory to the City of Chicago.

The territory voting on said proposition at said election was annexed to the City of Chicago, April 29, 1889.

The prohibition districts in question were created by ordinances of the City of Chicago passed after the annexation to the City of Chicago of the territory in which such prohibition districts are located, to wit: on July 27, 1896 and October 16, 1905, respectively.

I am of the opinion that such prohibition districts created as aforesaid were not affected by said election.

It appears that an amendatory ordinance was passed by the City Council of the City of Chicago November 15, 1897, (Chicago Code of 1911, p. 917) repealing the aforesaid ordinance passed July 27, 1896 "so far as the same pertains to Van Buren street, between West Fortieth and West Forty-second avenues."

Yours truly,

BRYAN Y. CRAIG,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

DECEMBER 30, 1911.

HON. HENRY ERICSSON, Commissioner of Buildings.

Dear Sir:

Your letter, in which you inquire whether, in estimating the allowable compression from loads to be supported by concrete caissons, the computation shall be made by taking the top of the caisson for a basis or whether the same shall be computed as coming on concrete on the bottom of the caisson, was referred to me for an opinion.

It seems that there is nothing in the building ordinances which defines specifically from what point the computation shall be made, although by inference it may be assumed that the top of the caisson is to be considered, since such requirements as do appear necessarily have reference to the strength of the caissons for the purpose of bearing loads and not to the strength of bedrock at the bottom which has practically no limitation.

The question involved is whether the weight of the caisson from the surface to bed rock shall be taken into account in computing the allowable stress.

If the caisson is so firmly held in place by the earth through what is termed "skin friction" and through irregularity of its shape and its variance from a perfect cylinder, together with the lateral pressure of the earth about it, as to make it entirely self-sustaining, so that a piece of same could be extracted from the bottom and it would hold its place and not sink down, it could be said that the length of the caisson need not be taken into account in determining allowable stresses. In such a case it would make no difference whether taken from the base or from the top.

I am informed opinions differ on this point. Some expert engineers claim that a caisson would sink of its own weight if a part of the base were removed. In that event its weight would have to be taken into account. I am told however, that most engineers hold that the caisson would not sink by its own weight under such circumstances, and that therefore, after due allowance is made for the character of the material in same, it could be regarded merely as a continua-

tion of the solid rock on which it rests, and need not be taken into consideration in calculating the stress.

Section 531, clause (b) gives the limit of the allowable compression on concrete piles, and also states where same shall be measured from, but this is not necessarily a guide to be followed in the construction of caissons. Neither can it be said that the table in Section 533 showing the allowable stresses in pounds per square inch on different kinds of concrete and stone masonry throws any light on this question.

It therefore, becomes your duty, under Section 201, clause (d), which gives you discretion in such matters, to pass upon the question. I understand that you have already done so, and that your ruling on the subject is, that in determining the area required for concrete caissons the load on the caisson shall be the load for which the basement column was designed, and allowable stress on the various kinds of concrete shall be as given in Section 533 (a) taken at the top of the caisson.

I assume that you have accepted the method and practice that appears to you the most reasonable and have exercised your judgment accordingly. It is to cover such propositions as these that Section 201, (d), was enacted, and such ruling as you have made on the point consequently will be regarded as the proper basis for builders to work on and permits may be issued accordingly.

Since experts differ in regard to the matter, it would seem to me desirable to have the point covered by ordinance, so that there may be no question in the future regarding the correct practice.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JANUARY 2, 1912.

HON. FRED A. BRITTEN, Chairman Committee on Civil Service,
City Hall, Chicago.

Dear Sir:

Replying to your favor of recent date requesting the opinion of this department as to the legal right of your Committee to recommend changes in the rules and regulations of the Civil Service Commission, I beg to reply that your Committee undoubtedly has this right and it is its duty to make such suggestions and recommendations as appear to it to be for the best interests of the city's service.

As to your further question whether the Commission is bound to follow out your recommendations and make changes in accordance with your suggestions, I beg to say that the only guides which the Civil Service Commission are compelled to follow are the duties, methods and forms of procedure laid down in the Civil Service Act, and such rules as they have made pursuant to said Act.

Section 4 provides in part that:

“Said Commission shall make rules to carry out the purposes of this Act, and for examinations, appointments and removals in accordance with its provisions, and the Commission may, from time to time, make changes in the original rules.”

I am, therefore, of the opinion that the Committee on Civil Service is without power to compel the Civil Service Commission to make changes in its rules and regulations to conform with recommendations from your Committee.

Yours very respectfully,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JANUARY 2, 1912.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Replying to your favor of recent date concerning the abolition of the position of inspector of police, we desire to say that an ordinance has been prepared striking out from Sections 1907 and 1908 of the Chicago Code of 1911 the word "inspector." This abolishes the position or office heretofore created by the City Council.

In addition to that the Supreme Court has held that the failure of the Council to appropriate for a specified position in the City's service is in effect an abolition of such position.

Fitzsimmons v. O'Neill, 214 Ill. 494.

The action of the City Council in failing to appropriate for the position of inspector of police, would, consequently, legislate these officials out of office and there is no present provision in the Civil Service law or rules whereby they would fall back into the positions from which they were certified, namely, captaincies.

With a view to meeting this situation, we have consulted with Mr. Lower of the Civil Service Commission and have suggested an additional rule, which will take care of the condition which has arisen. The rule will, if adopted, provide that upon the failure of the Council to appropriate the salary of a given office or place of employment, the incumbent of such office will be placed upon a reinstatement list in the next lower rank or grade, and any vacancy in such rank or grade will be filled first from such reinstatement list. This rule, to comply with the law, must have a certain period of publication and will not be fully adopted and in force for a period of seventeen days. When the rule becomes effective at the end of this period the City Council can pass the amendatory ordinance hereinabove referred to, and the former inspectors will then be placed upon the reinstatement list and be ready for reinstatement in captain's positions.

The question of the legality of this rule is not free from doubt. We are, however, of the opinion that its adoption is

the best and most practicable way to meet the existing condition.

Very respectfully yours,
 JOHN W. BECKWITH,
Assistant Corporation Counsel.
 HERBERT J. FRIEDMAN,
Attorney for Civil Service Commission.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JANUARY 2, 1912.

HON. CHARLES M. THOMPSON, Alderman 25th Ward.

Dear Sir:

Your communication addressed to Mr. William H. Sexton, Corporation Counsel transmitting copies of two proposed ordinances, wherein you ask for an opinion as to the validity of same has been referred to me for a reply.

Under one ordinance it will be unlawful for any person operating any motor vehicle or motor bicycle to pass or approach nearer than ten feet from a street car which has stopped for the purpose of discharging or taking on passengers, as long as the street car is stopped or remains standing.

The power of the city to make the regulations contained in this ordinance is derived under several sections of the Cities and Villages Act.

Under the 9th Clause of this Act, page 174 Session Laws of 1911 the city is given the power *to regulate streets.*

Under Clause 66 of the same act the city is given the power to license and control "*all wagons * * * and other and enforce all necessary police ordinances.*"

Under Section 96 of the same act the city is given the power to license and control *all wagons * * * and other vehicles.*"

Under the foregoing clauses you will observe that the power of the city with reference to regulation of streets and vehicles is very broad.

Under the police power alone, there is no question the

city has the power to make all reasonable regulations relating to the use of the streets. (McQuillan on Mun. Corp., Section 458.)

In the section just quoted, McQuillan says:

“The protection of life and limb is a matter of public concern and *there is both a power and obligation on the part of the public authorities to pass and enforce reasonable police provisions for this purpose.*”

The power to regulate streets, gives to the city all needful authority to keep the streets free from obstructions and to prevent the improper use thereof and to pass necessary and reasonable ordinances to that end. (Dillon on Municipal Corporations, Sec. 1161, Vol. III, 5th Ed.) And courts have held that under this statutory authority, *reasonable ordinances regulating the use of motor vehicles on the streets of a city could be enacted.* (Dillon on Mun. Corp. Sec. 714, Vol. III, 5th Ed.)

In Section 1166 of the same volume DILLON says:

“Ordinances reasonably regulating the traffic, are legislative acts, which are not subject to judicial control.”

The act of June 10, 1911, contained in the Session Laws of 1911, page 487, however has made a large number of provisions with reference to “Motor Vehicles and Motor Bicycles,” and under Section 12 of this act “Local Ordinances prohibited”—“no ordinance, by-law or resolution heretofore or hereafter made by any city, in respect to or limiting *the use or speed* of motor vehicles or motor bicycles shall have any force, effect or validity, and they are hereby declared to be of no validity or effect.”

Under this provision it would be unlawful for municipalities to further regulate “Motor Vehicles and Motor Bicycles” were it not for the presence of an excepting clause in the same section which reads as follows:

“Provided that nothing in this act contained shall be construed as affecting the power of municipal corporations to make and enforce ordinances—affecting motor trucks—*or from making and enforcing reasonable traffic and other regulations except as to rates of speed not inconsistent with the provisions hereof.*”

The Statute does not preclude municipal corporations

from making reasonable traffic regulations, and it has been held that the mere fact that the use and operation of automobiles is regulated by Statute, does not prevent a municipality under *properly delegated authority* from adopting compatible local ordinances and regulations even on the same subject. (Dillon on Municipal Corporations, Sec. 714, Vol. III, 5th Ed.)

It may be claimed that the ordinance under discussion is class legislation and therefore not valid, since the regulations apply to certain specific kind of vehicles and bicycles, to wit *Motor Vehicles* and *Motor Bicycles*.

In answer to this objection, we would state that not all class legislation is invalid. Classification for legislative purpose is permitted as long as the classification is reasonable.

McQUILLAN on Municipal Corporations, Section 193, says:

“The difference which will support class legislation, must be such as in the nature of things *furnishes a reasonable basis for separate laws and regulations. The law will be held valid if it operates equally upon all subjects within the class for which the rule is applied.*”

DILLON on Municipal Corporations, Sec. 714, Vol. II, 5th Ed. says:

“The uses of the street *must be extended to meet new means of locomotion.* These Statutes (regulating automobiles) are not open to the objection that they are class legislation discriminating against certain persons in the use of the public highway. The high speed at which automobiles may be operated and the peculiar dangers attending their use justify the legislature in legislating for them as a distinct class.”

For the foregoing reasons, we are of the opinion that the ordinance under discussion is valid although we further believe that the ordinance could be improved if one or two words were changed to make the meaning clearer.

The above applies also to the second ordinance transmitted with your communication, relating to regulations concerning headlights and reflectors.

In this ordinance there is a provision that the lamp and mirror or reflector should be so adjusted “that when in use all of the direct rays of light thrown out by said lamp or said

mirror or reflector shall strike the ground *within a distance of at least three hundred feet from said lamp.*"

We call your attention to the Section 4 of the state act regulating Motor Vehicles and Motor Cycles which provides that motor vehicles and motor bicycles shall carry lamps "showing lights visible at least two hundred (200) feet in the direction toward which each motor bicycle or vehicle is proceeding."

You will note that under the ordinance the rays must strike the ground within a distance "of at least three hundred feet." The words "at least" seems to indicate that the light must strike the ground not less than three hundred (300) feet, whereas under the state law, all that is required is that the vehicles show lights visible at least two hundred (200) feet. The ordinance and the act might be inconsistent, for the reason that in order to throw rays at least three hundred feet as required by the ordinances, the lamp might have to be adjusted in such a way that the light would be seen at a greater distance than two hundred (200) feet. In this event the ordinance would conflict with the state law, since all that is required by the state law is that the lamp should throw a light visible at least two hundred (200) feet.

In our opinion, should the provisions relating to lights be changed so as to be consistent with the State Law, the ordinance would be perfectly valid.

Respectfully submitted,

MAX. W. KORSHAK,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JANUARY 3, 1913.

HON. HENRY ERICSSON, Commissioner of Buildings.

Dear Sir:

October 25, 1912, you sent to me a petition from property owners in the vicinity of 51st street and Greenwood avenue, protesting against your department issuing a permit for the

erection of stores at the southeast corner of Hyde Park boulevard (51st street) and Greenwood avenue.

You state that application for the permit was on file in your department and ask to be advised in the matter.

Section 712½ of the Chicago Code of 1911, makes it unlawful to locate, build or construct any store for the sale at retail of goods, wares and merchandise on any street in any block in which all the buildings are used exclusively for residence purposes, without first securing and filing with you the written consent of a majority of the property owners according to frontage on both sides of the street in the block in which the building to be thus used is located.

I did not heretofore answer your communication for the reason that on October 22, 1912, the City Council passed an order directing the commissioner of buildings to enforce strictly the provisions of Section 712½ of the Code. (C. P. 2029.)

I assume that under this council order you refused the application for the permit and as a mandamus suit has been instituted by applicants to compel the issuance of the permit, this raises the question of the power of the City Council to pass and enforce Section 712½ of the Code.

My opinion is that the validity of this section is very doubtful but in view of the fact that the City Council has passed this order I did not answer your communication. My purpose in now writing you is to close the correspondence on the matter.

Yours very truly,

WM. H. SEXTON,
Corporation Counsel.

JANUARY 3, 1913.

HON. EDWARD F. DUNNE, Governor-Elect of the State of Illinois.

Dear Sir:

In order that you may have a summary of the financial affairs of the City of Chicago before you, we submit a brief statement of the conditions that confront the city's fiscal officers. We refer to many matters of law with which you

are no doubt familiar, but deem it best to mention them in order to show how they apply to the situation in hand.

The taxes levied in any given year for expenses for corporate purposes are not collected until the following year, but the law permits the municipality, in order to realize enough to run the government for the current year, to issue anticipation warrants to the extent of three-fourths of its tax levy.

Since the city can in this way realize only three-fourths of its revenue from taxation for the current year, it must start in with what for convenience may be called a "balance" (made up of cash and unanticipated taxes) equivalent to one-fourth of the total revenue from taxation—otherwise it will have to subsist on the three-fourths it can anticipate.

At the beginning of the fiscal year 1912 the city had such a balance sufficient for the purpose indicated. This balance amounted to \$4,065,577.21. The appropriations for 1912 were made on the basis of the total assessed valuation of city property for 1911 (\$928,974,204.00), and if the same method of fixing the rate had prevailed in December when the rate was extended by the County Clerk as at the time of making these appropriations, there would have been sufficient revenue realized to meet the appropriations and to leave a balance with which to begin the year 1913 on substantially the same footing as the year 1912 was begun on. The assessed valuation of city property for 1912 turned out to be \$940,450,171.00, consequently there was no miscalculation on this point.

Under the Juul law the aggregate of all the rates of taxation of the different taxing bodies, exclusive of certain exceptions mentioned therein, must be within three per cent., subject however to certain minimum rates, among which is the city's minimum rate of \$1.10 on each \$100 of assessed valuation.

Until the recent decision of the Supreme Court it was understood that the provisions of that law saying that there should be no reduction of the levies for sinking fund and interest on bonds meant that the levies for same could be added to the levy for corporate purposes and a tax rate extended over and above the \$1.10 sufficient to take care of them. Under

that theory the tax rate for the city for 1911 exclusive of library and tuberculosis sanitarium was \$1.43.

The City of Chicago is practically the only municipality that is affected by all of the provisions for reducing taxes in the Juul law. The wording of this law is somewhat involved, and its requirements have been frequently misunderstood. It is only since the middle of last year that it has been interpreted as it is now construed. The language used is general in its nature, but by a series of provisos and exceptions its application is narrowed down so that less and less of its provisions apply to other counties than Cook, or other municipalities than Chicago, and finally we come to a point where only the City of Chicago is affected by them. The City has been more and more restricted by each new amendment to the original law, and has been especially hard pressed by the amendment of 1909, which is now in force.

Prior to the year 1909, the maximum rate of taxation for the city was \$2.00 per \$100.00 of assessed valuation; for the county 75c; for the Sanitary District \$1.00; for School Board educational purposes, not including school buildings, \$2.50; for Tuberculosis Sanitarium 10c; for Public Library 10c, while the park districts were not limited. Thus there was a possible \$6.45, to which should be added a park and town tax that was not limited, and the total was subject to scaling. The law at that time provided for an assessed valuation of one-fifth of the full valuation and a limitation of five per cent. on the rate of taxation.

In 1909 when the law was amended, the assessed valuation became one-third of the full valuation, and a limitation of three per cent. was placed on the rate of taxation. The maximum rates of all taxing bodies were not reduced correspondingly. It would have required the amendment of various acts to bring this about, only a portion of which were amended, and it will be seen at a glance that the city was more severely dealt with than the rest. Its maximum limit was reduced to \$1.20, the School Board's educational maximum limit was reduced to \$1.50, and the library's was reduced to \$.06, while the maximum rates for the other taxing bodies remained the same. When it is remembered that the School Board and

Library Board have no bonds to take care of it appears that all the other taxing bodies can protect themselves in a measure against being scaled down too much, while the city is helpless, since its maximum is so near to its minimum rate that there is practically no latitude allowed to guard against excessive scaling.

The above limitations, combined with the additional limitation that the Supreme Court's interpretation in the case of *People, etc. v. T. St. L. & W. R. R. Co.*, 254 Ill. 472, puts upon the city, has resulted in rates being fixed for the various taxing bodies within the city exceedingly out of proportion to the respective needs of these taxing bodies.

Thus, under the new method of arriving at the tax rate, the city was awarded \$1.10, the county \$.52, the school board \$1.05 for educational purposes and \$.34 for school building purposes, the Sanitary District \$.49, the West Park \$.69, the South Parks, \$.38, Lincoln Park from \$.49 to \$.56, etc. While these figures in themselves show a disproportion in the distribution of taxes, their full significance is not realized until we deduct from the city's \$1.10 the \$.42 required for interest and sinking funds on bonds, thus leaving it only \$.68 for the corporate purpose's fund.

The tendency of all taxing bodies to swell their tax levies in order to realize as large a proportion as possible of the three per cent. permitted by law when the reduction is made, has resulted in practically fixing the rate for the City of Chicago at \$1.10. Although the city is permitted under the law to levy for \$1.20 and add to that a levy sufficient to pay interest and provide the necessary sinking fund for its bonded indebtedness, it in fact never realized anything beyond the minimum allowed by law.

In the year 1911, as stated above, this minimum was understood to be fixed by law, and was fixed by the County Clerk in extending the rate, at \$1.10 plus the rate necessary to pay the levies for bonded indebtedness, which under the Juul law could not be reduced, a total of \$1.43. In the year 1912, after the appropriation bill was passed and the tax levy was made on this basis, the Supreme Court held that the

bonded indebtedness levies must be included within the rate limitation.

The total amount of the tax levy for 1912, was \$18,162,429.30, of which the sum of \$3,701,682.81 was for interest and sinking fund on bonded indebtedness. Under the rule which prevailed in 1911, therefore, the rate on a total assessed valuation of \$940,450,171.00 would have been \$1.10 plus \$.42 for sinking fund and interest on bonded indebtedness or a total of \$1.52. Under the rule fixed by the Supreme Court decision above referred to, the \$.42 was stricken out. Therefore the sum of \$3,701,682.81, the entire amount of the levy for the bonded indebtedness, was cut off from the city's revenues. This happened, not only after the appropriations were made, but after they were more than half spent, so that the most rigid retrenchment did not suffice to recoup the loss.

In order that sufficient revenue might be obtained to enable the city to meet its obligations it was necessary to draw anticipation warrants for about the same proportion of the tax levy as usual. While the law permits such warrants to be drawn up to three-fourths of the amount of the tax levy, it has been the custom to issue such warrants only to the extent of about three-fourths of the amount expected to be realized, which was always much below the amount of the levy. Thus, in 1911, the amount of the levy was \$17,961,547.34 and the amount realized, owing to the reduction under the Juul law, was \$12,663,776.35. While it was understood that the proportion which would be realized from the 1912 levy of \$18,162,429.30 would be much lower, nevertheless it was necessary to issue anticipation warrants to about the same extent as before, with the result that the balance which the city would have had with which to begin the fiscal year of 1913 is practically wiped out.

The balance which was \$4,065,577.21 at the beginning of 1912 amounts to only \$870,801.60 (estimated) at the beginning of 1913.

Thus it will be seen that the City of Chicago not only enters upon the year 1913 with its revenues cut so that it cannot maintain the city government on its present standard,

but also with a loss carried over from the year before of \$3,194,775.61.

It has been suggested that by so amending the Juul law that the levies for interest and sinking funds on bonded indebtedness shall be excluded from the rate limitation the revenues of the city would be again on the same basis as before the year 1912. While this may be true as to the annual income, it will be observed from the above figures that this would not restore the loss suffered by the city in 1912, and until that loss is restored, either by the issuance of bonds or by an increased tax rate, the city's finances will remain crippled.

In order to meet the situation the City Council has passed an appropriation bill which contemplates the payment of only 80 per cent. of the salaries and only 70 per cent. of other expenses outside of fixed charges unless relief is obtained through legislation, the balance being appropriated contingent on such relief.

The payments thus withheld in round numbers will amount to \$4,500,000.00. It appears from the Comptroller's estimates that if the Juul law is amended so that bond levies will be outside of the city's minimum rate of \$1.10 there will be available, as against the amounts so withheld, the sum of \$2,094,921.75, which is three-fourths of the estimated increase and which can be raised by anticipation warrants. The City Council appropriated only \$23,736,494.38 to be paid out of the corporate purposes fund in 1913 as against \$25,643,951.96 in 1912.

It will thus be seen that although there has been a material reduction in appropriations, and although it is contemplated that no additional bonds for improvements voted by the people shall be issued until the finance of the city will permit, the city would still be short about two and one-half millions if the legislature stopped short at amending the Juul law. The only way in which full salaries can be paid out and the public improvements made that have been submitted to a referendum and approved is by legislation that will restore the loss suffered by the city in 1912.

This could be done by means of an act enabling the city

council to issue bonds for corporate purposes without a referendum in the sum of \$2,700,000.00 to recoup the net loss sustained by the corporate fund.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JANUARY 4, 1912.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

In regard to the case of John A. Weber, first-class patrolman in the service of the City, I beg to report that Weber became a member of the police department of the City of Chicago as patrolman on December 31, 1884, and remained a member of the department until August 29, 1910, upon which latter date he voluntarily resigned from the said department. His resignation was duly accepted, and being at that time an officer of twenty years' service and over fifty years of age, he filed on September 2, 1910, an application with the Board of Trustees of the Police Pension Fund of the City for a pension, which was awarded to him on the 11th day of October, 1910, at the rate of \$600 per annum.

A short time thereafter Weber, whose home had been for some years in the village of Morgan Park, applied for and obtained employment from said village as a police patrolman and was occupying such position and exercising the duties thereof on April 4, 1911. On this date, by an election held thereon, Morgan Park was annexed to the City of Chicago, as it then appeared.

According to the provisions of Section 17 of "An Act to provide for the annexation of cities, incorporated towns and villages," etc., approved April 25, 1889,

"* * * all policemen and firemen lawfully in the employ of any city, village or incorporated town, the whole of which may be annexed to another, as provided in this act, shall be transferred to and become a part of the

police and fire department force of such city, village or incorporated town.”

By virtue of the above provision, Weber became entitled to a position or place of employment upon the Chicago police force.

I am informed by Assistant General Superintendent of Police, Herman F. Schuettler, that Weber made official application to him for reinstatement upon the police force, and that thereupon the Assistant Superintendent informed him that it would be necessary for him (Weber) to resign from the pension roll, as it would be impossible for any person to draw salary from the City as police patrolman and at the same time a pension from the pension fund.

Mr. Schuettler reports that Weber thereupon said to him that he would immediately resign from the pension roll and waive all claims to a present pension if he could be placed upon the police force and that he would at once go to the clerk of the pension board and tender his resignation and sign whatever waivers were required. Immediately thereafter Weber appeared before Mr. A. W. Rugg, clerk of the Police Pension Board, and requested Mr. Rugg to remove his name from the pension rolls on the ground that he was to become a policeman and could not be placed upon the police roll until his connection with the pension roster had ceased. Mr. Rugg thereupon removed Weber's name from the pension rolls and gave Weber a letter to the Assistant Superintendent of Police stating his (Rugg's) action in the premises.

Weber thereupon went to Mr. Schuettler's office and told Schuettler that he had resigned from the pension roll and would make no claim for any pension so long as he might be a policeman.

In regard to the point of Weber's relinquishing all right to a pension, Mr. Schuettler is practically clear and emphatic.

Upon the representation thus made to him, Mr. Schuettler took such steps as were necessary for transferring Weber to the official police force of the City, where he now re-

mains, being stationed, as I understand, near his home in Morgan Park.

A short while after his reinstatement upon the police force Mr. Weber, in violation of his assurances to the Assistant General Superintendent of Police, made a demand upon the Board of Trustees of the Police Pension Fund, through his attorney, Clarence N. Boord, for restoration to the pension roll. The Board requested from the writer and obtained a full history of Mr. Weber's case, unanimously declined to place Mr. Weber's name upon the pension rolls, and instructed the writer, as the Board's attorney, to resist Mr. Weber's claims to the very fullest extent, it being the sense of the Board that the effrontery of Weber in thus seeking to impose himself upon an already overburdened pension roll while in the receipt of a generous salary from the City as a police patrolman was unparalleled.

Shortly after Weber filed suit in the Circuit Court. The Board's demurrer to his petition for mandamus was argued before Judge Windes a few weeks ago and overruled, Judge Windes holding that the petitioner, by reason of having been granted a pension, was not disabled from obtaining other employment elsewhere, and having obtained employment in Morgan Park on the police force, which he was entitled to do, and having become a Chicago policeman by virtue of annexation through no act or fault of his, he could not be deprived of his pension simply because he was in receipt of a salary as a patrolman.

There is authority in New York for such a holding. In that State a policeman of New York City retired upon a superannuated pension and moved to New Utrecht, Long Island, where he was employed upon the police force of that village. The village of New Utrecht was subsequently annexed to the City of Brooklyn, and later the City of Brooklyn, under the Greater New York Consolidation Act, became a part of the City of New York and the former patrolman of New York became again a member of the police force of Greater New York. The New York pension authorities immediately cut off his pension and he brought suit to become reinstated. The Court of Appeals held that he was entitled

to his pension despite the fact that he was drawing pay as a policeman.

Since the decision of Judge Windes, Judge Walker has intimated that he would hold that the annexation of Morgan Park was not legally effected by the election of April 4, 1911, and I understand the City will take an appeal from any such ruling.

If Morgan Park was not properly annexed on April 4th Weber will automatically lose his position on the police force of the City and will then become entitled to his pension. In the meantime he is causing his own department, as well as the law department, an unnecessary expenditure of time and work in defending on behalf of the City and the pension board, a suit brought against these bodies by one of the City's own employes, which, on its face, presents a somewhat anomalous condition of affairs.

In addition to this, according to the statements of the clerk of the pension board and the Assistant General Superintendent of Police, Weber has been guilty of making a false statement to a superior officer in regard to a material matter connected with the police force.

Being transferred to the police force of the City of Chicago by operation of the annexation statute, Weber does not hold his position by virtue of or through a Civil Service examination and appointment and is in the same position in regard to his tenure of office and removal therefrom as a "hold-over", that is, he is removable by the General Superintendent of Police with the consent of the Mayor. Even though he were a Civil Service employe I am of the opinion that his false statement to his superior officer would constitute grounds for his amotion.

Very respectfully yours,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

CHICAGO, JANUARY 5, 1912.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Your request for an opinion on your authority to revoke theater licenses for cause was referred to me for consideration and reply.

This department has for years consistently held, that the Mayor has power to revoke such licenses in his discretion whenever he is satisfied that good cause exists.

The Chicago Code of 1911 gives general discretionary power to the Mayor over the granting of licenses. Under Section 1512 he is also given general power to revoke, for cause, any license granted by him.

Under this general power the Mayor has authority to revoke a license whenever good cause is shown, either by judicial determination or otherwise, unless there appears some provision in the ordinance relating to the licensing of a particular occupation which limits or more clearly defines this power. In such cases the more specific provisions must prevail.

In Section 116 of the Code there are certain conditions mentioned under which it is the duty of the Mayor, to give the licensee reasonable notice to defend a charge, and then, if it is sustained to his satisfaction, he has the right to revoke the license. The question of whether or not this is to be construed as a limitation on the Mayor's general power to revoke is not without difficulty, but a close study will reveal the fact that the three particular offenses mentioned there, are but a few of the many causes for which a license may be revoked, and there appears to be a reason for particularly mentioning these as distinguished from the ordinary causes.

Hence, we must come to the conclusion that in the case of amusement licenses, all the provisions of the ordinances which relate specifically to the Mayor's powers can be construed as adding to instead of limiting the general powers mentioned above.

Thus, the power given under Section 109 to refuse a license in case he deems the place is not a fit or proper one, or not constructed or operated in conformity with the ordi-

nances, or if he regards the entertainment immoral or dangerous, or the person applying for a license as not of good moral character, is in addition to the general discretionary power over the granting of licenses, given in Section 1515. Likewise, the provisions of Section 116, to which I alluded above, requiring that amusement licenses shall contain certain things and authorizing the Mayor to revoke the license of a person violating such requirements, is only intended to specify some offenses on account of which the power of revocation could be exercised.

All amusement licenses issued by the City contain the following clause:

“This license is subject to all Ordinances now in force or which may hereafter be passed concerning entertainments, and may be revoked by the Mayor at any time at his discretion.”

The acceptance of a license containing this clause where the ordinance gives full discretion, will bind the licensee. (*Wiggins v. City of Chicago*, 68 Ill. 372.) In the absence of an ordinance giving the Mayor such complete discretionary power, it would probably not bind the licensee. In this case the discretionary power is not absolute. But, on the other hand, backed by the power to revoke such license for cause, the clause is sufficient to put beyond all question, the Mayor's right to act when cause is shown.

I take it that the precise question in the present instance is whether a judicial hearing is necessary. On that point it was held in one case where such power was placed in the jurisdiction of a board of health that a finding of that board, after hearing before it, was sufficient.

Met. Milk & Cream Co. v. City of New York, 98 N. Y. S. 894. Affirmed 186 N. Y. 533.

Other cases in which there appears to have been no preliminary judicial determination, but, in which the court upheld the power to revoke for cause, are the following:

City of Grand Rapids v. Braudy, 105 Mich. 670.

Hutchins v. Town of Durham, 118 N. C. 457.

Higgins v. Talty, 157 Mo. 270.

People v. Commission of Village of Saratoga Springs, 86 N. Y. S. 445.

Towns v. City of Tallahassee, 11 Fla. 130.

From the above it appears quite clear that where cause is shown which in your judgment is sufficient for the revocation of such a license, you are not bound to wait for a judicial determination before acting.

In the above opinion, I have not referred to Section 1519 of the Code, which makes it the duty of the Mayor to revoke licenses where a person has failed to pay the amount due thereon, since that provision explains itself and necessarily is outside of the question on which you asked for an opinion.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JANUARY 6, 1912.

HON. JOHN MCWEENY, General Superintendent of Police.

Dear Sir:

Answering the verbal request of A. C. Scott, Assistant of the Vehicle Department, for an opinion as to whether automobiles supplied by Garages who furnish operators are required to post rates of fare, I beg to reply as follows:

It seems that in a large number of cases, Garages receive orders for automobiles to call and transport passengers from one part of the city to another. The rates of fare are not posted in these automobiles and this has caused a great deal of dissatisfaction for the reason that the operators take advantage of the public and charge more than the law allows.

The provisions regulating Garages are found in Article VIII "Garages", page 839 of the Chicago Code of 1911.

In this article there is no provision for the rates of fare to be charged but the rates are fixed in Article II "Public Automobiles for Passengers", page 818 of the Chicago Code of 1911.

Section 2613 of this Article provides as follows:

"Rates of fare.) The rate of fare to be asked or demanded by the operator or person in charge or control of any automobile, autocar or other similar vehicle operated for the conveyance of passengers, for hire or reward, within the city, shall not exceed the following prescribed rates."

Then follow regulations with reference to rates to be charged under different conditions.

We can not however find any provision in our ordinances under which Garages can be compelled to post rates of fare in the automobiles which they send out to carry passengers from place to place.

There is a provision for the posting of rates of fare for "Public automobiles for Passengers" in section 2597 under Article II, page 818 of the Chicago Code of 1911.

This section provides as follows:

"Posting of rates in vehicles.) There shall be fixed on the inside thereof and in a conspicuous place, in every vehicle licensed under the provisions of this article, in such manner that the same may be easily and conveniently read by any person riding therein, a card to be obtained from the city clerk, on which shall be printed the name of the owner and the number of the license of such vehicle, and also the whole of section 2613 relating to rates of fare, and the whole of sections 2605 and 2606 relating to the carriage of baggage, and lost baggage."

In our opinion this provision only applies to vehicles "licensed under the provisions" of Article II and does not include automobiles sent out by Garages. The vehicles so licensed under Article II are found in section 2588 of the same code which provides as follows:

"All public automobiles to be licensed.) No automobile, autocar or other similar vehicle which shall stand or be kept upon any public cab and hack stand or upon any street or public way in the city, for employment, shall be used anywhere within the city for the carrying or conveying of persons for hire or reward unless such vehicle shall be licensed as hereinafter provided."

There is also a provision for posting notices in Sec. 2661 of the Chicago Code of 1911 under Article V "Taxicabs".

Section 2661 provides as follows:

"2661. Rates of fare to be posted in taxicabs.) There shall be affixed on the inside of each taxicab in a conspicuous place and in such manner that the same may be easily and conveniently read, by any person riding in such taxicab, a card upon which shall be printed in plain,

legible type the rates of fare provided for in this article."

This Section applies to "Taxicabs" only, and does not include automobiles sent out by garages when operators are furnished.

We are therefore of the opinion that unless a new ordinance is drafted specifically requiring garage owners to post rates of fares in the automobiles which they send out with operators, to carry passengers it will be impossible to successfully maintain prosecutions for failure on the part of Garage owners to post notices.

Respectfully submitted,

MAX M. KORSHAK,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JANUARY 9, 1912.

HON. LAWRENCE E. MCGANN, Commissioner of Public Works.

Dear Sir:

In the due course of business it has come to the knowledge and notice of the Law Department of the City of Chicago that the mode, system and operation of the Water Department in the matter of the assessment, collection and enforcement of water rates under the present water ordinances, is not as broad, complete and adequate as it might be.

The Water Department of Chicago is a source of large continuous revenue to the City of Chicago, and is handicapped by the present water ordinances which, in the opinion of this department, do not meet the demands of the present business situation and are in many ways ineffective, incomplete and obsolete.

There is no doubt but that a revision of the water ordinances would be a large financial gain to the City of Chicago.

The law is that the city furnishes water to the consumer in the capacity of a private corporation and that the consumer is primarily liable. Yet the books of the Bureau of Water merely show and give the street and number of the

premises to which the water is furnished, rarely, if ever, giving the names of the real consumers of the water, in consequence of which, when there is a change in the ownership of the premises, a sale in fee simple of the premises, a transfer of the lease or leasehold, or a private understanding between the landlord and tenant as to who should pay the water rates, the Water Department is unable to furnish the names of the proper parties to be held liable to this department for taking legal action.

The Water Department under its present system is hardly ever informed in advance who is the actual consumer, or of any private understanding as between the landlord and tenant as to the payment of water rates, and under the law, when this department is called upon to prosecute a case for the recovery of money due the city for the delivery of water, it finds itself without proper, legal and sufficient evidence to make out a case.

In some instances bills for the collection of back water charges for one, two and three years, next prior to their date of issuance, are presented to this department for collection, for what reason we know not; why the Water Department should not be able to present a bill in full for water charges up to the date of the rendition of the same is a mystery and matter that needs attention. In some instances one meter supplies water to two or three or more tenants at one and the same time, and when any of these persons move out of the premises, or become insolvent or bankrupt, a dispute arises as to who was actually using the water, and how much of the water each of the disputing parties consumed, upon which points the Bureau of Water cannot give any satisfactory information, and which points for lack of said information cannot be legally proved in a suit for recovery.

At present, also, the city furnishes meters into premises at its own expense without securing itself against loss thereof, by some written instrument from the owner, in case of removal of the consumer, and in this way many meters are lost and the city has no one against whom it may proceed for a recovery for want of a proper understanding between the city and the person for whose benefit a meter was installed.

Under the frontage rate system it is the theory of the ordinances to hold the owner in fee simple of the premises furnished with water primarily liable, but this theory is entirely contrary and inconsistent with the present decisions and law, and invariably the books of the Water Department fail to show who is the owner, or whether a tenant is the consumer of the water, and further whether there is an agreement between the landlord and tenant, and when claims of this nature are transmitted to this department for collection, this department is helpless before a multitude of inconsistent, uncertain, confusing and inaccurate situations which would keep a larger number of investigators than is at present employed in this office busy all the year round endeavoring to ascertain who was the landlord, who was the tenant, who was the actual consumer of the water, was there any understanding between the landlord and tenant, before this department could take intelligent legal action. When any concern of any nature turns over a claim for collection to a firm of attorneys it generally communicates the name of the other party or parties to the contract, but such is not the case with the Water Department, as you will note that all bills bear only a street and number, lack a legal description of the premises and are addressed indiscriminately to the owner or occupant, who most generally escapes liability by merely moving, because without their names they cannot be traced and found. Although under the Suspense System the succeeding consumer of water is made to pay from the time he actually commences to use water, yet the previous consumer whose name is generally unknown and who is known only by the term of occupant, tenant or owner, escapes for the same reasons as above mentioned.

As far as consumers of water going insolvent, bankrupt, dying testate or intestate, or going into receivership, etc, is concerned, this department is filing claims in those estates as fast as the Water Department presents the claims and information.

The relation between any municipality and the consumer of water, according to the tenor of the present decisions, is a contractual relation, the same as that which exists between

a gas corporation and its consumer, a telephone company and its subscriber, and no good reason exists why the city should not operate its water system in much the same manner as do other private corporations, and inasmuch as water is a necessity of life, the city could very readily require consumers of water to sign proper applications in person, stating the premises to be furnished, governed by ordinances providing for reasonable rates, providing for the liability of the consumer or party who signs the application until actual notice of shut-off be given to the city, requiring a deposit where necessary in case of the installing of an expensive meter, and providing for such contingencies as each case should require, which applications could be placed on file and from which applications so filed intelligent, practical or legal action could be taken in each case.

In regard to municipal, charitable, educational and religious institutions which are excused from the payment of water rates under certain conditions the Water Department today is laboring under difficulties as presented by the decisions of the courts, as to what constitutes such institutions and when such institutions are or are not charitable corporations. The Water Department should not be required to sit as a court to determine these questions, which under the present status of the law is a difficult thing to do, but the onus of showing that an institution is a charitable corporation should be placed upon the institutions seeking the favors and privileges granted by the ordinances.

More specific ordinances on this subject pointing out how and when the Water Department may consider such institutions as charitable, etc., compelling them to produce and file their certificate of incorporation, requiring them to produce other proper credentials and affidavits in conformity with the decisions of the court, before putting them on the exemption list, would be beneficial to the city.

Inasmuch as a water tax is not a lien on the real estate, but is merely a charge for a certain amount of water used, and the relation between the city and the consumer is a contractual one, it seems proper that ordinances along these lines should be drafted. The power to shut off water as pro-

vided by the ordinances very often imposes upon the Commissioner of Public Works the duty (and he is bound to obey the ordinances and exercise his power to shut off water) to commit an act which is contrary to the law and which involves the city in a damage suit and renders the performing official liable on his bond, and very often an innocent succeeding and subsequent tenant is made to pay for the water consumed by his predecessor whom he had never known.

An inquiry into this feature of the ordinances and a revision of the same to meet present conditions would also be beneficial alike to the city and the consumer.

This letter is not written for the purpose of lightening the burden of the Law Department to enforce the collection of a great many claims which are unnecessarily heaped upon this department, nor should any statements made herein be held to impute any inefficiency to the Water Department, but it is solely written for the purpose of attempting to bring about the revision of antiquated ordinances, and in lieu thereof the substitution of up-to-date ordinances, which will facilitate the work both of the Water Department and the Law Department and save thousands of dollars to the City of Chicago in the matter of claims.

It is suggested that a proper committee consisting of persons acquainted with the conditions and qualified to act be appointed to investigate the situation and take such action as the situation requires.

Respectfully submitted,

J. J. VITERNA,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JANUARY 9, 1912.

HON. JOHN E. TRAEGER, Comptroller.

Dear Sir:

The above question which was submitted to this department with the communication of Joseph F. Peacock, Esq., City Real Estate Agent, of December 30, 1901, requires the following answer:

Section 3 of Article X of the Cities and Villages Act, provides that:

“The City Council * * * shall have power to make all needful rules and regulations concerning the use of water supplied by the water works of said City.”

Section 4 of “An Act authorizing cities, incorporated towns and villages to construct and maintain water works,” (Approved and in force April 15, 1873) contains practically the same provisions.

Pursuant to these charter powers the City Council has passed appropriate ordinances.

Section 2733 of the Chicago Code of 1911 provides that every *consumer* of water and *every owner, occupant or person in possession, charge or control* of any *building*, structure or premises supplied with water * * * shall be governed by and subject to * * * such rules and regulations as may from time to time be adopted and approved by the city council.

Section 2758 provides that the word “premises” shall be held to include a lot or part of a lot, a building or part of a building, or any parcel or tract of land whatever.

Commencing with Section 2760 there follow provisions for the different rates to be charged for the use of water.

Section 2800 provides in what manner charges shall be collected in case of a change of ownership, by foreclosure or otherwise.

Liability for the payment of water rates is clearly a matter of contract between the City and any one of the persons named in Section 2733 of the Code.

In the case submitted by you I am of the opinion that the landlord or owner of the building remains liable for all water used, unless the City has accepted in his place the tenant as the person from whom it will collect.

Such acceptance would shift the liability upon the shoulders of the tenant and would for the same reason, release the owner from all liability.

It is to be regretted that the ordinances of the City are

not more specific in defining who shall remain liable in case of default by the occupant of a building.

Yours very truly,

NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JANUARY 9, 1912.

MR. CHARLES H. MITCHELL, Attorney, Board of Election Commissioners.

Dear Sir:

As requested by the gentleman who is making a tentative draft of precincts in your office, I have had prepared a small map of that part of the boundaries of the second and third wards which is described as follows:

“* * * thence northwest along the center line of Cottage Grove avenue to the center line of East 38th street projected; thence east along the center line of East 38th street projected to the shore of Lake Michigan.”

He has asked me what line shall be used by him. I have answered that the foregoing air line must be construed in connection with section 2 of the ordinance by which ward lines have been established.

He should, therefore, use the building or lot line nearest to the center line of the street projected to Lake Michigan, defining the boundary line by lot or house numbers.

You have a precedent for this action in the line established between the third and sixth wards in 1901, when the township line between Hyde Park and the South Town was used instead of the center line of 39th street, which, if enforced, would have made the line between the two wards run through a number of buildings east of Cottage Grove avenue and south of 39th street.

Bearing this in mind the saving clause in the new ordinance was inserted for the very purpose of avoiding a similar predicament.

This gives the Board of Election Commissioners discretion

to follow the nearest or most conveniently located straight building line along the projected street to the lake.

Very truly yours,

NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JANUARY 9, 1912.

HON. HENRY ERICSSON, Commissioner of Buildings.

Dear Sir:

Your letter of recent date, in which you submit the case of the Drexel Amusement Company's new theater at 852-58 E. 63rd Street for consideration, was referred to me for an opinion:

This is to be a building of Class V. One of the requirements, therefore, is an open ten-foot space on each side of the audience room, as specified in paragraph (b), Section 402, of the Chicago Code of 1911.

The ten-foot space in this instance is open to the alley in the rear, and the question is whether it is necessary, under the ordinance, to connect this space with the street in front by means of a fire-proof passage-way.

This involves the construction of the two following sentences taken from Section 402, paragraph (c).

"Every such space, if it does not open into a public thoroughfare, shall communicate with the public thoroughfare at the front side of the theater by a fire-proof passageway leading from the bottom level of such open space to the sidewalk level. Where there is a public thoroughfare behind the stage, every such open space shall also communicate with such public thoroughfare by a fireproof passageway leading from the bottom level of such open space to the level of the public thoroughfare behind the stage, and passing under the stage."

This provision must be interpreted to mean that where the space in question opens into a public thoroughfare, either at the front or rear of the building, all requirements are met. If this space does not open into a public thoroughfare, how-

ever, then it must connect with the street in front by means of a fireproof passageway in every instance, and in case there is a thoroughfare in the rear it must connect with that also.

This conclusion is arrived at by applying two well-known rules of construction. One of these demands that the two sentences quoted above must be interpreted with reference to each other. The other rule requires an interpretation that gives effect to every word used.

The first sentence in the excerpt quoted above clearly means that the fireproof passageway to the front is required only when the open space does not extend right up to and lead into a public thoroughfare either at the front or the rear—in fact it can have no other meaning.

The second sentence is not so plain because the meaning of the words “such open space” in that is confined to an open space which does not lead into a public thoroughfare. That is to say, in the first sentence the ordinance states what must be done in case “such open space” does not extend to the thoroughfare, and in the next sentence “such open space” means only the open space last spoken of—the one that does not so extend to the thoroughfare.

Any other interpretation is bound to lead to either a contradiction or an absurdity. Thus, if it meant the other kind of open space, then the word “also” would mean that if the open space led to the street it would also have to be connected with the alley, while, owing to the wording of the first sentence, if the open space led to the alley it would not have to be connected with the street. This is manifestly absurd. Again, if the word “also” is held to mean that both thoroughfares must be connected no matter if the open space extends to one of them, it does violence to the plain meaning of the first sentence and renders the words “if it does not open into a public thoroughfare” meaningless. Besides, the word “also” itself would be unnecessary, if that was the meaning intended, and its omission would make such an interpretation tenable; while now, if such an interpretation is persisted in, the word has the effect of requiring a fireproof passageway whether the open space extends to the alley or not. It would certainly have been much easier to say that the open space

must either extend to, or be connected by a fireproof passageway to both the front and rear thoroughfares, if that was the purpose of the requirement. Hence, the construction I have given above is the only one possible.

It was evidently the intention of the framers of the ordinance to provide for additional security in the case of an open space that did not extend to a thoroughfare by having a passageway run both ways to the two thoroughfares, while in other cases an open and free walk through an uncovered space was considered sufficiently secure. It is true that where there is no alley in the rear the open space on one side may connect only with the front by means of a passageway, but in that case the other side of the theater must necessarily be alongside of a public thoroughfare, and the added safety arising from that fact may be regarded as balancing the deficiency on the enclosed side.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JANUARY 11, 1912.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF CHICAGO.

Gentlemen:

October 30, 1911, your honorable body passed a resolution requesting an opinion from the Corporation Counsel, which is as follows:

“That the Corporation Counsel be and he is hereby directed to draft the necessary ordinance or ordinances requiring installation of gas service pipes for all vacant lots prior to the paving of any street and submit same to this council. Or if the council now lacks the power to enact such laws he shall advise the council what, if any, legislation may be necessary to give the council the authority to pass the needed ordinances.”

Until the adoption of the Constitution of 1870 special charters were granted by the Legislature of this State to gas

companies, conferring the privileges of laying gas mains in the streets. The Chicago Gas Light and Coke Company was incorporated by act of the General Assembly, approved February 9, 1855. (Laws and Ordinances 1873, pp. 172-173.)

This company derives its right to lay its mains and pipes in the streets of Chicago from the Legislature; therefore the City Council cannot compel said company to so extend its pipes; the extent of its power being to establish proper regulations for the protection of the streets, and to prevent damages, etc.

13th Cl. Sec. 63, Ch. 24, Incorporation Act, S. & C., p. 464.

The Peoples Gas Light and Coke Company was incorporated by special act of the Legislature, approved February 12, 1855, amended by an act approved February 7, 1865. (Laws and Ordinances 1873, pp. 174-175.)

The act gave the company power "to lay pipes for the purpose of conducting the gas in any of the streets and avenues of said city *with the consent of the City Council.*" The City Council of the City of Chicago passed on August 30, 1858, an ordinance granting said company permission to lay its mains, pipes, etc., in the public streets and alleys of the said city. Whatever power the City Council may have to compel this company to extend its pipes must be found in this ordinance. Finding no provision in the ordinance, I am of the opinion that the City Council has no such power.

These two companies were incorporated by special acts of the Legislature. The Constitution of 1870 provided, in Section 22 of Article 4, that the General Assembly should pass no local or special law for "granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever", and, in Section 1 of Article XI "No corporation shall be created by special laws, * * * but the General Assembly shall provide, by general laws, for the organization of all corporations hereafter to be created." In pursuance of this section of the Constitution of 1870 the general incorporation act of 1872 was passed. All the existing gas companies except the two mentioned above have been incorporated under the general incorporation act of 1872.

Section 1 of Article V of the general act for the incorporation of cities and villages confers upon the City Council the power to regulate the use of streets;

“To regulate the openings therein for the laying of gas or water mains and pipes”

and further, that any company

“organized for the purpose of manufacturing illuminating gas to supply cities or villages, or the inhabitants thereof, with the same, shall have the right, by consent of the Common Council (subject to existing rights), to erect gas factories, and lay down pipes in the streets or alleys of any city or village in this State, subject to such regulations as any such city or village may by ordinance impose.”

The gas companies now operating in the City of Chicago have all, with the exception of the Chicago Gas Light and Coke Company, derived the right to lay their pipes and mains in the streets and alleys of said city from the City Council. The ordinance in which this power is granted is a contract between the City of Chicago and the gas company receiving the franchise, and the city cannot, without the consent of the gas company, change the terms of the contract entered into by the ordinance, nor abrogate or nullify it.

State v. Laclede B. L. Co., Am. & Eng. Cor. cases, 34, p. 19.

City of Quincy v. Bull, 106 Ill. 337.

City of Burlington v. Railway Co., 49 Iowa 144.

Chief Justice Taney said, in the case of *Ohio Life Ins. & Trust Co. v. Debolt*, 16 How. 428, and his language in that case was quoted by Mr. Justice Harlan, in the *N. O. Gas Light Co. v. Louisiana Light, etc., Company*, 10 Am. & Eng. Cor. Cases, 659:

“ * * * For it can never be maintained in any tribunal in this country that the people of a State, in the exercise of powers of sovereignty, can be restrained within narrower limits than that fixed by the Constitution of the United States, upon the ground that they make contracts ruinous or injurious to themselves. The principle that they are the best judges of what is for their own interest is the foundation of all political institutions. It is equally clear, upon the same principle, that the people of a State may by the form of government they

adopt, confer upon their public servants and representatives all the power and rights of sovereignty which they themselves possess; or may restrict them within such limits as they deem best and safest for the public interest.' After observing that the power of the State to make contracts may be indiscreetly, and, for the public, injuriously, exercised, he proceeds: 'Yet if the contract was within the scope of the authority conferred by the constitution of the State, it is, like any other contract, made by competent authority, binding upon the party. Nor can the people or their representatives, by any act of theirs afterwards impair its obligation. When the contract is made the Constitution of the United States acts upon it, and declares that it shall not be impaired and makes it the duty of this court to carry it into execution. That duty must be performed.' "

In interpreting these ordinances the ordinary rule of interpreting contracts must be applied.

"In the absence of fraud or palpable abuse of discretion on the part of municipal authorities contracting for a water supply, the only question for judicial cognizance, in reviewing the contract, is whether there has been a violation of legal principles or neglect of any prescribed formalities."

Van Reipen v. City of Jersey City (N. J. Sup.), 33 A. 740.

"Where a city ordinance granting a franchise to a water company allowed the company to charge a certain price for water, and there was no provision in the city charter, or in the statute creating it, giving the Council power to repeal or alter the grant, a subsequent ordinance reducing the price one-half, and making it unlawful for the company to exact an amount in excess of such reduced price, and providing for the repeal of all conflicting ordinances is void."

City of Ashland v. Wheeler, 88 Wis. 607.

"The City of New Orleans was held to have the power to contract for a water supply under the provisions of its charter; and having this power to contract, it was held that the price, the kind of water and the amount, were matters of legislative discretion vested in the City Council; and that when the city confined itself within the limits of its powers to contract, this legal discretion exercised by the City Council could not be inquired into by

the courts, in the absence of fraud and corrupt and extravagant legislation.”

Beach on Pub. Cor., p. 572.

Conery v. New Orleans Water Works Co. (1889), 41 La. Ann. 910.

Mayor, etc., of Rome v. Cabot, 28 Ga. 50.

We have examined a long line of authorities on the question of the liability of gas companies to supply gas, but all such authorities have been upon the question of such liability where the connections have been already made, the gas supplied for some length of time and then for some reason the service discontinued. We have been unable to find any authority which would warrant us in holding that a company can be compelled to do more than the provisions of the contract require.

We quote from some of the ordinances granting to the gas companies the right to lay their pipes and mains in the streets and alleys, the section providing for the extension of said pipes and mains.

Ordinance granting franchise to the Consumer's Gas, Fuel & Light Company, Sec. 2, page 161, Special ordinances of Chicago, 1898, Vol. 2:

“Sec. 2. * * * Said company shall, when ordered by a majority of the City Council, extend its main pipes in any block one-half of which shall be improved by buildings.”

Ordinances granting franchise to the Equitable Gas Light & Fuel Company, section 2, p. 176, Special Ordinances of Chicago, 1898, Vol. 1:

“Sec. 2. * * * Said company shall, when so ordered by a two-thirds vote of all the aldermen elected, extend their main pipes in any block three-quarters of which shall be improved by buildings.”

Very nearly all the ordinances under which the existing gas companies in Chicago are operating contain no provision by which the gas companies can be compelled to extend their mains or service pipes. However, these ordinances must be interpreted by the same rules as all contracts. The city has been bound by the acts of its competent contracting officers and must stand or fall on their acts, not tainted by fraud or

palpable abuse of discretion. Whatever power the City Council has to compel the gas companies to require installation of gas service pipes for vacant lots prior to the paving of any street depends upon the terms of the ordinance under which the individual gas company operates; if the ordinance contains no provision for the extension of the gas mains or service pipes the company operating under such ordinance cannot be compelled to so extend its mains or service pipes; if the ordinance contains a provision for the extension of the gas mains or service pipes, the City Council acting under the provisions of the section in the ordinance in regard to extension of gas mains or service pipes, can compel the company to so extend its mains or service pipes.

As to the recommendation for the passage of a law which would compel the gas companies to lay service pipes, we would respectfully advise you that such legislation would be a violation of the contract entered into by and between the City of Chicago and the gas companies.

Very respectfully yours,

EDWARD T. WADE,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JANUARY 11, 1912.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

On the 8th inst. Mr. John D. Riley, Superintendent of Maps, addressed a communication to the Hon. William H. Sexton, Corporation Counsel, requesting an opinion as to whether the City or the Bureau of Maps and Plats should recognize plats registered in the Torrens' office of Cook County, when the same was not recorded in the Recorder's office as required by the statutes on plats and the same is referred to me for reply.

The plat in question is a re-subdivision of lots 114 to 115 in the 3rd Division of the South Shore Subdivision fractional section 30, township 38 north, range 15, east of the 3rd prin-

cial meridian, and was registered in the Torrens' office of Cook County, October 17th, 1911, but was not recorded as required by the statute on plats. Under Chapter 109, Section 2 of the Revised Statutes of Illinois, it is necessary that a plat should be certified by a surveyor and acknowledged by the owner of the land or his attorney duly authorized in the same manner as deeds of land are required to be acknowledged.

Chapter 30, Section 54 of said Statutes requires "the description of land" to be set out in the application to bring the land under the Torrens' system.

The requisition of description of the land does not supersede the requirement of the statute under Chapter 109 and such application to the Registrar and registration does not make the statutory requirements relative thereto nugatory.

The said statute on plats has not been repealed and is therefore in full force and effect, and conformity thereto is necessary for a proper completion of a re-subdivision of the land in question.

Yours respectfully,

S. A. T. WATKINS,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JANUARY 15, 1912.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Replying to your letter inquiring whether the publication of the City's Advertising in the "early editions" of afternoon newspapers is a full compliance with the law in regard to such publication, I beg leave to submit the following:

The designation of the official journal and the manner of letting the contract for the printing of the City's Advertising, as prescribed in Chapter XLIX of the Chicago Code of 1911, is qualified by the statute, which requires that such a newspaper (unless otherwise provided by contract) shall be a "secular newspaper of general circulation."

While Section 1663 of the Code only limits the publication to an English newspaper published at least six times a week, nevertheless, in the succeeding sections there is authority for the exercise of some discretion, and, under Section 1667, the board making the award can take into consideration the circulation of the bidders' newspapers within the limits of the city.

The protest of the publishers of the Chicago Daily Law Bulletin which is attached to your letter, and which seems to be based on the theory that the contract must be let to the publisher of an English daily paper who makes the lowest bid, can be of avail only in case the board should discriminate unjustly and arbitrarily against a bidder whose bid is the lowest, taking into consideration the circulation of the paper, and who is as reliable and responsible as the bidder who is given the contract.

The claim of the Chicago Daily Law Bulletin for consideration in this connection is based on the decision of our Supreme Court in the case of *Railton v. Lauder*, 126 Ill. 219. In this case the only evidence submitted on the part of the plaintiff was merely an affidavit showing that the publication was made in the Chicago Daily Law Bulletin, of which a copy was attached. To this the defendant filed a counter affidavit describing the paper. The court says, page 220:

“* * * These two affidavits being the only proof offered by the respective parties on the hearing below, we are left entirely to the affidavit last mentioned, and an inspection of the several copies made exhibits, for information as to the real character and circulation of the paper.

The affidavit of the publishers shows that the publication is made in the City of Chicago, and that the paper is one of general circulation, and these facts are wholly uncontradicted. We must also accept as true his statement that it is a secular newspaper, and that there is published in it news and information of a general secular character, unless, upon an inspection of the copies filed with the affidavits, we are convinced that such statements are false. In fact, all that is offered by appellant in support of his motion, either by way of proof or argument, is to invite our attention to the copies of the paper attached to the two affidavits. We are not prepared to say,

from what appears in these numbers, alone, that the sworn statements of the publisher are untrue, and must therefore, hold the paper in question to be a secular newspaper of general circulation, within the meaning of the statute—sec. 5, chap. 100.”

The language of the above decision taken in connection with the discretion authorized by the Code, hardly justifies a protest in case the board decides it is for the best interests of the City to award the contract to another newspaper.

Passing now to the proposed letting of such a contract to a paper for publication in its “early editions” only, such arrangement does not seem proper in view of the authorities quoted below.

In *State of Iowa v. Omaha & C. B. Ry. B. Co.*, 52 L. R. A. 315, it was held that the publication of an ordinance in an extra edition of a daily newspaper issued at 11 o'clock at night, of which 50 or 100 copies were sold on the streets and on trains and purchased by interested parties, was not a publication as required by law.

In *Pratt v. Tinkcom*, 21 Minn. 142, most of the papers containing the publication were mailed on the 24th of January, but did not leave the post office until the 25th. There were some distributed by carrier on the 24th, the balance on the 25th. The 25th was the first day on which the publication was valid under the law. The question, therefore, was whether such publication was made on the 25th. The court said, in *Pratt v. Tinkcom*, 21 Minn. 142:

“* * * The remaining 130 copies of the issue bearing date January 25th, being about one-sixth of the whole edition, were distributed by carrier among subscribers in Mankato on that day, after the power of sale had become operative, and the mortgagee was entitled to give notice of foreclosure and sale; but the publication of notice in those 130 copies was not a sufficient publication. Without undertaking to lay down a general rule, applicable to all cases where a notice has failed to appear in every copy of the regular issue of a newspaper, we think it entirely clear that a notice appearing in only one-sixth of the whole number of copies of an edition regularly printed and published, is not published in such newspaper within the meaning of the statute.

There was, therefore, no publication of any notice

in the issue bearing date January 25, and the notice of sale was first published in the next following issue of the paper, that bearing date February 1."

In the case of *Tully v. Bauer*, 52 Cal. 487, the question arose on the publication of the delinquent tax list. Under the statute the list could be published in the supplement of a paper, but it was held that if so published in a supplement it must be in one of which the circulation is co-extensive with that of the paper both in and out of the city and county. The court said:

"* * * In this case the delinquent list was published in a supplement to the newspaper; and it was proven that the supplement was not circulated co-extensively with the newspaper, but was delivered to subscribers and others within the city and county, and not to those without the city and county. It was not the intent of the statute that the list might be published in a single copy, or a limited number of copies, of a supplement to the newspaper; but that it might be published in a supplement which was distributed for circulation generally with the newspaper. The publication in this case does not conform to the statute, and therefore is insufficient as a notice of the time of sale."

It is a matter of common knowledge that the afternoon papers published in Chicago have a comparatively limited circulation for their "early editions." Most of the papers purchased by the people of the city and surrounding territory are of the late editions.

It cannot be contended that the "early edition" is in any sense a different publication. If that were the case, such abuse as was practiced in the Iowa case cited above might be indulged in. An edition could be run off consisting of 50 or 100 copies and distributed by sale or otherwise, to interested parties. This would certainly be insufficient, and, as soon as that is admitted, the question arises as to where the line could be drawn.

There is no doubt, therefore, that the only safe method to pursue is to contract for publication in all the regular edi-

tions of a paper each day that such a publication is required by law.

Yours respectfully,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

CHICAGO, JAN. 11, 1912.

HON. WILLIS O. NANCE, Chairman Sub-committee of Committee on Health Department.

Dear Sir:

In response to your request for a written opinion on the ordinance that you submitted to me regulating the sale of hypodermic syringes and needles, I have carefully considered same, and beg leave to submit the following:

This ordinance prohibits any one from selling at retail or furnishing to any other person than a duly licensed physician, dentist or veterinarian, or on written order of one of these, either a hypodermic syringe or hypodermic needle. It also requires a record to be kept, with the name and address of the purchaser, and a description of the instrument sold, in all cases where any one obtains such an instrument on the order of a physician, dentist or veterinarian.

A most diligent search of the authorities fails to disclose a case where the police power has been exercised by a municipality in this way, while many ordinances of a similar nature have been held invalid.

The purpose of the ordinance undoubtedly is to limit the use of cocaine and similar drugs, and to prevent their reaching persons addicted to the habit of inoculating their systems with same by means of the instruments mentioned in the ordinance.

It may seem hard to draw the distinction between a law regulating the sale of cocaine and like drugs and prohibiting such sale except under rigid restrictions, and a law intended to accomplish practically the same result by prohibiting the sale of instruments designed to inject these drugs into the

body. It may be said that if the one is within the police power of the State or municipality as tending to promote the health of the public, then the other, designed for the same purpose, must also be.

There are, however, two distinctions. In the first place the drugs in question are themselves injurious to health, and therefore belong to the general class of poisons which the state can regulate the sale of in order to prevent their general dissemination. In the next place the instruments used may also be used for other purposes entirely legitimate, and such legitimate use does not necessarily cause any injurious effect.

This distinction has been observed in the case of abortifacients. The sale of eebolic or abortifacient drugs and medicines is rigidly restricted by law, while there is no restriction placed on articles or instruments which are not medicinal but designed for the same purpose except restrictions placed on advertising them as instruments for abortion and sending them through the mails or through a common carrier in inter-state commerce.

There is no exact definition or limitation of the police powers of the state or municipality, but it can be said that the police powers do not extend so far that they will enable a municipality to protect a person against himself.

Dillon, in his work on *Municipal Corporations*, 5th Ed., Sec. 677, says:

“* * * persons and property are subject to all reasonable kind of restraints and burdens in order to secure the general comfort, health and prosperity of the State.”

The question to be settled in each case is whether the proposed enactment will be for the benefit of the general public or for the individual who is to be restrained. It is quite probable that the law as it stands on the general subject of the sale of cocaine and like injurious drugs approaches the limit of the power of the state.

On this point Tiedeman, in his work on *Limitations of Police Power*, Sec. 102, says:

“* * * It is not enough that the thing may become harmful, when put to a wrong use. It must be in itself harmful, and incapable of a harmless use. Poison-

ous drugs are valuable, when properly used, but they may work serious injuries, by being improperly used, even to the extent of destroying life. But it would be hardly claimed that, on that account, their sale could be prohibited altogether. Safeguards of every kind can be thrown around the sale of them, so that damage will not be sustained from an improper use of them, but that is the limit of the police control of the trade. Thus, for example, opium is a very harmful drug, when improperly used, and it is all the more dangerous because the power of resistance diminishes rapidly in proportion to the growth of the habit of taking it as a stimulant, and a miserable, degraded death is the usual end. * * * The sale of it can, of course, be prohibited to minors and to all who may be suffering from some form of dementia, and to confirmed opium eaters. But it would seem to be taking away the free will of those who are under the law confessedly capable of taking care of themselves, if the law were to prohibit the sale of opium to adults in general."

The purpose of imposing restrictions and burdens must be to advance the comfort, health, morality or inconvenience of the public in general, and not merely the health of the individual upon whom the restraint or burden is placed.

Aside from the fact that this ordinance is designed to protect a person from the consequences of his own appetites and desires, instead of the protection of the public in general, there is the further objection to the ordinance in question, as stated above, that it limits, and to a certain extent prohibits, the sale of articles which might be used for purposes entirely legitimate and different from the use intended to be restrained.

While it is possible that such instruments ordinarily should be used only by physicians or persons trained to a skillful manipulation of same, there is no warrant in law for confining their use to such persons.

With regard to the record to be kept of such sales, as proposed in this case, there seems also to be grave doubt as to the right to require such a thing.

In the case of *Clinton v. Phillips*, 56 Ill. 102, it was held that an ordinance which required a druggist to furnish to the city clerk a statement in writing showing the kind and quantity of liquor sold for certain purposes, which the law per-

mitted same to be sold for, was an invasion of the private rights of both the vendor and the purchaser.

The court in deciding that case made use of the following language:

“The section is suspicious in its spirit, and excessively stringent in its requirements. It permits the sale, and then imposes the most odious conditions. A mere venial omission is tortured into a grave offense, punishable with a heavy penalty. The private citizen, invested with no public office or employment, should not be subjected to such inquisitions.”

City of Clinton v. Phillips, 58 Ill. 102.

Therefore, in my opinion, it would be too extreme an exercise of the police powers to restrict the sale of such instruments as contemplated in the ordinance you submitted.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JANUARY 12, 1912.

HON. LAWRENCE E. MCGANN, Commissioner of Public Works.

Dear Sir:

Your letter of inquiry in regard to the appointment and bonds of bridge tenders was referred to me for attention.

You state that there is confusion in regard to appointment of bridge tenders—that the Code authorizes their appointment by the Mayor, but that they are in fact certified by the Civil Service Commission. You ask whether this confusion as to the method of appointment affects the sureties on their bonds in any manner.

While the legal effect of a bond properly drafted and executed by a bridge tender would very likely be held to be substantially the same as if he had been appointed according to ordinance, nevertheless this confusion has some effect on it, especially if there should happen to be some error made when it is executed which would make it insufficient, informal or defective as a common law obligation.

The principal distinguishing feature of an official bond is that the statutes or ordinances relating to it are included within its terms and form part of the contract, and the conditions, obligations and liabilities imposed by same are included just the same as if they were read into the instrument.

Freudenstein v. McNier, 81 Ill. 208.

Estate of Ramsay v. People, 197 Ill. 572.

Such being the case, an insufficient, informal or defective official bond has frequently been held good. (See authorities, 37 Cent. Dig. Col. 2006.) The courts have gone to the last extreme in upholding such instruments, in one case even deciding that where the officer placed his name in the body of the instrument instead of at the end it bound him. (*McLeod v. State*, 69 Miss. 221.)

On the other hand a bond which is construed as a common law obligation will be interpreted with the utmost strictness. The bonds of bridge tenders not appointed according to ordinance must be held to be common law obligations only.

“An official bond, given by one whose appointment was irregular, but whose office was established by law, though void as a statutory obligation, may be enforced as a common law obligation.”

United States v. Maurice, Fed. Cas. No. 15,747.

There will probably be no difficulty in enforcing the bonds of bridge tenders which you now hold, if an occasion for doing so should arise, because, besides the common law obligation the doctrine of estoppel could be invoked. But, since there is a difference in legal effect as a result of the confusion on this point, therefore, if the present method of appointing bridge tenders through the civil service commission is to be followed in the future, it would be advisable to change the ordinance to conform to this method. Hence, I have drafted an amendment to Sections 1098 and 1099 of the Code, in accordance with your request, and submit same herewith.

You also point out that the Code is vague as to what employes of the Department of Public Works should be required to give bonds. I assume that you refer to Section 2067, which mentions several classes of employes of whom the Commissioner of Public Works should require bonds, but does not

specify them particularly. I judge that the section was worded in this way because the number of employes to be under bond may vary from year to year or even from time to time at shorter intervals.

You state that you would like to have the ordinance define clearly what officials and employes in your department should give bonds to the City. This can be done readily if you will furnish the necessary data. It would not be feasible for any one in this department to single them out from the information he could get out of the appropriation bill, but with assistance from your department an amendatory ordinance could be framed which would meet your objection to the provisions now in force.

In regard to the payment of premiums on bonds of officers and employes, this is permissible under the Statute of June 7, 1897, providing for the payment of the cost of corporate suretyship upon official bonds. I am informed that all surety company bonds, which comprise nearly all official bonds now in force, are at the present time being paid for by the city.

At your suggestion I have drafted an ordinance amending section 1642 of the Code so as to provide specifically for the payment of such bonds by the city. While such amendatory ordinance affects all departments generally, and more properly comes within the scope of the comptroller's supervision, I have deemed it best to cover the whole field by the one amendment. Otherwise, if special provision were made for paying the bonds of officers and employes in your department, such provision might be construed as excluding others. This ordinance is also submitted herewith.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JANUARY 9, 1912.

HON. HENRY ERICSSON, Commissioner of Buildings.

Dear Sir:

In your letter of recent date you ask of this department whether Section 695 of the Chicago Code of 1911, relating to bill-boards and sign-boards attached to buildings, covers all the requirements of the code as to that particular class of bill-boards or sign-boards.

Your inquiry has reference particularly with regard to whether permits will have to be taken out for same, whether the restrictions as to size and height contained in the other sections apply to them, and whether they are subject to periodical inspection like other bill-boards and sign-boards.

By examining Section 695 and reading it with reference to all other sections contained in the article relating to bill-boards and sign-boards, it would seem that the only reason for differentiating this class from other classes is the fact that additional privileges may be said to be given when bill-boards and sign-boards are fastened to the sides of buildings. That is to say, while they are not permitted above the roofs of buildings, still they are permitted above the height fixed for others, and the size does not appear to be limited. The provisions concerning permits and inspections, however, apply to these as well as to other bill-boards and sign-boards.

While there is nothing in the wording of the body of Section 696 which expressly distinguishes the bill-boards and sign-boards mentioned therein from those mentioned in Section 695, nevertheless the caption of the section speaks of "bill-boards and sign-boards erected within fire limits otherwise than on buildings." Inasmuch as the caption was enacted as part of the Code, it must be held to explain and limit the provisions embodied in this section, which might otherwise be misunderstood. Therefore Section 696 does not apply to bill-boards on the sides of buildings. Section 697, if read in connection with the other sections, and especially in connection with Section 696 which it follows, clearly relates only to those bill-boards and sign-boards referred to in Section 696.

Section 698 provides for small bill-boards and sign-boards not exceeding twelve square feet in area, which are therefore not involved in this matter.

Section 699 so clearly provides for bill-boards and sign-boards outside of the fire limits, as distinguished from those within the fire limits provided for in Sections 696 and 697 and follows the wording of Section 697 so closely that there can be no doubt as to its meaning, and it must be regarded as covering a class of bill-boards not mentioned in Section 695—in fact, the wording of the section and the requirements specified therein are such that it could not be applied to bill-boards or sign-boards constructed on the sides of buildings.

After we pass these sections, however, there seems to be nothing which should give rise to the impression that the provisions in the various sections thereafter do not apply to bill-boards and sign-boards on the sides of buildings as well as to all others. The frontage consent requirement in Section 707, of which I shall speak later, may be regarded as an exception in some cases.

The provisions of the sections relating to permits, alterations, wind pressure, the placing of the owner's name on top, annual inspection, and in fact all the other requirements mentioned, with the exceptions noted above, apply with equal force to bill-boards and sign-boards on the sides of buildings as to others.

The provision with regard to frontage consents in residential districts is of somewhat doubtful application, inasmuch as I understand the article on bill-boards and sign-boards to apply to name and business signs on buildings, such as the ordinary commercial signs, as well as to what are ordinarily known as bill-boards.

It is very questionable whether such a provision, if intended to apply to a sign on a building used for commercial purposes advertising the business carried on within, could be enforced. I am of the opinion that it would be proper to construe Section 707 as not relating to such signs, but only to the kind of signs which are usually erected by the regular sign-board advertising concerns.

The above seems to cover all questions you asked in your letter of inquiry.

Yours respectfully,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JANUARY 19, 1912.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

December 28, 1911, the Committee on Finance recommended the passage of the following order by the City Council:

“Ordered, That the Corporation Counsel is hereby authorized and directed to permit a judgment or judgments to be entered against the City of Chicago in such amount or amounts as is necessary to pay for the purchase by the Board of Election Commissioners of not to exceed two hundred voting machines at \$942.50 each, in favor of the company selling the same to the Board, upon the presentation to the Corporation Counsel of a certificate or certificates of said Board of Election Commissioners, countersigned by the City Comptroller as to the number of such voting machines received and accepted by said Board, and to waive appeal or writ of error on the entry of such judgment or judgments.

This is in lieu of item 25F appearing at page 24 of the ‘Departmental Estimates, Budget 1912, with Comptroller’s Estimates,’ appropriating \$188,500.00 for the purchase of 200 voting machines at \$942.50 each.”

(See Journal of Proceedings, p. 2237.)

At the last meeting of the City Council the Chairman of the Finance Committee moved the adoption of said order. The roll call showed thirty-one “yeas” and twenty-nine “nays” and as the presiding officer, you declared the order “passed.”

The question presented for consideration is, whether the proposition required a majority vote of all the aldermen elected or merely a majority of those voting. Section 13 of Article III of the Cities and Villages Act is the only section applying to the subject matter and reads as follows:

“The ‘yeas’ and ‘nays’ shall be taken upon the passage of all ordinances, and on all propositions to create any liability against the city, or for the expenditure or appropriation of its money, and in all other cases at the request of any member, which shall be entered on the journal of its proceedings; and the concurrence of a majority of all the members elected in the city council shall be necessary to the passage of any such ordinance or proposition. *Provided*, it shall require two-thirds of all the aldermen elect to sell any city or school property.”

Hurd’s R. S. 1909, page 340.

I understand that heretofore the Board of Election Commissioners of the City of Chicago entered into a written contract with a certain corporation for the purchase of a number of voting machines. This contract was made under the authority of the act entitled “An Act to provide for the use of voting machines at elections, for casting, registering, recording and counting ballots or votes. Also creating a board of voting machine commissioners and defining its duties,” approved May 14, 1903, in force July 1, 1903. (Id. p. 1066.)

The proposition to adopt voting machines under the provisions of said act was submitted to the voters of the City of Chicago at a regular election held November 8, 1904, and a majority of all votes cast was in favor of said proposition.

The constitutionality of said act was sustained by the Supreme Court in the case of *Lynch v. Malley*, 215 Ill. 574. The only constitutional question raised in that case and passed upon by the Supreme Court was the claim that the act was in conflict with section 2 of article 7 of the Constitution of 1870, which is: “All votes shall be by ballot.”

I have carefully considered the provisions of said section 13 of article III of the Cities and Villages Act and the purpose of the order and have reached the following conclusions:

First: The order is not a proposition “to create any liability against the city,” and, therefore, does not require a majority vote of all the aldermen elected to pass.

Second: The order is a proposition “for the expenditure * * * of its (the city’s) money” and therefore, I am of the opinion that under the provisions of said section 13 a majority vote of all the aldermen elected is necessary.

In my opinion, the vote of thirty-one "yeas" was insufficient to pass the order and the order was not passed.

Respectfully submitted,

WM. H. SEXTON,

Corporation Counsel.

JANUARY 19, 1912.

HON. CHARLES TWIGG, Chairman, Committee on Gas, Oil and Electric Light.

Dear Sir:

Replying to your recent request for an opinion as to whether the Chicago Telephone Company can be compelled to reinstate the "nickel last" service in cases where "nickel first" service has been installed without the consent of the subscriber, and also whether the City Council can prevent the future installation of "nickel first" telephones where the subscriber does not consent thereto, we beg to say that the Chicago Telephone Company is operating its telephone system in the City of Chicago under the authority of an ordinance entitled, "An ordinance authorizing the Chicago Telephone Company to construct, maintain and operate a line of telephone wires in the City of Chicago," passed by the City Council November 6, 1907 (c. p. 1907-1908, p. 3109) which ordinance was duly accepted by the said telephone company.

Section 5 of said ordinance is, in part, as follows:

"The Chicago Telephone Company shall, without extra charge therefor to its lessees, subscribers and patrons or the City of Chicago, at all times maintain its plant system, wires, cables, electrical conductors and other equipment and service at the highest practicable efficiency, and to that end shall promptly adopt and put into use within the City of Chicago all available improved apparatus, appliances, equipment and methods of service, developed in the progress of the art of telephony, which shall have come into common use from time to time, or if experience has shown them to be practicable, and shall furnish the same to its said lessees, subscribers and patrons within said City of Chicago. Said Chicago Telephone Company shall at all times during the period of this grant so operate its plant, system, wires, cables, electrical conductors and other equipment as to give to its said lessees, subscribers and patrons the best service

possible under then existing conditions of the art of telephony. * * *

The City Council shall also have the right by ordinance to regulate from time to time during the term hereof, in any manner each and every kind of service which said Chicago Telephone Company may hereafter deal in, furnish or supply in the City of Chicago under or by virtue of this grant."

Section 7 of said ordinance is, in part, as follows:

"The City Council, as one of the conditions of the grant of the privileges herein conferred upon the Chicago Telephone Company, hereby reserves to itself the right from time to time during the period of this grant, by special ordinance amendatory hereof, to hereafter establish, fix, prescribe and regulate the rates, charges, prices and tolls, or other compensation or any limitations thereupon, for each and every kind of service, facilities and equipment which the Chicago Telephone Company furnishes or supplies, or may furnish or supply, in the City of Chicago, under this ordinance and also the basis, method, manner and means of computing, exacting, imposing, paying and collecting such rates, charges, prices and tolls, or other compensation of said Chicago Telephone Company. * * * The Chicago Telephone Company, by the filing of the acceptance of the terms and conditions of this ordinance hereinafter provided for, shall be understood as expressly consenting and agreeing to promptly accept, adopt, put into effect, and operate its system of wires, cables, electrical conductors, poles and conduits, in the City of Chicago under any reasonable schedule or schedules of rates, charges, prices, tolls or compensation for telephone service, instruments, facilities or equipment, or for all or any of them, or any reasonable schedule or schedules of limitations upon such rates, charges, prices, tolls or compensation, or any reasonable rules and regulations relating thereto and also the basis, method, manner and means of computing, exacting, imposing, paying and collecting such rates, charges, prices and tolls, or other compensation of said Chicago Telephone Company, which the City of Chicago may, by special amendatory ordinances, establish, fix or prescribe from time to time, after the expiration of thirty months from the time this ordinance goes into force and effect, and any reasonable schedule or schedules of rates, charges, prices, tolls or other compensation for any other service, instruments, facilities or equipment, other than those herein mentioned, or for all or any of them, or any

reasonable schedule or schedules of limitations upon such other rates, charges, prices, tolls or compensation, or all or any of them, or any reasonable rules and regulations relative thereto, which the City of Chicago may, by special ordinance, establish, fix or prescribe from time to time after this ordinance goes into force and effect.”

Subdivision (c) of Section 6 of said ordinance is, in part, as follows:

“Nickel prepayment service shall be furnished by said Chicago Telephone Company by means of telephone instruments equipped with a coin box and slot or similar device for receiving five-cent pieces,” * * *

The ordinance does not expressly either authorize or forbid the “nickel first” service. In fact, the ordinance does not in any way mention or refer to what is popularly called “nickel first” and “nickel last” service.

On January 15, 1912, the City Council passed two orders as follows:

“Ordered, That The Chicago Telephone Company desist in the installation of the so-called ‘nickel first telephones’ until such time as the city council shall have determined whether or not said ‘nickel first telephones’ are an improvement and better the telephone service.

“Ordered, That The Chicago Telephone Company be and it is hereby directed to at once change all so-called ‘nickel first telephones’ installed in the City of Chicago back to the ‘nickel last telephones’ except in cases where the subscriber requests the Chicago Telephone Company in writing to continue the ‘nickel first telephone service.’ ”

Any action on the part of the City in respect to the “nickel first” and “nickel last” service, would, in effect, amount to an amendment of the ordinance of November 6, 1907, by the introduction of an item of regulation not expressly included in said ordinance. The ordinance could be amended only by an ordinance. An ordinance cannot be amended by an order or resolution of the City Council.

C. & N. P. R. R. Co. v. City of Chicago, 174 Ill. 439;

People v. Mount, 186 Ill. 560;

People v. Latham, 203 Ill. 9.

Moreover, the ordinance of November 6, 1907, contemplates and expressly provides (Sec. 5 above quoted) that the

City shall have the right "*by ordinance*" to regulate every kind of service which the telephone company may furnish under the grant, and (Sec. 7 above quoted) that the City reserves the right "*by special ordinance amendatory hereof,*" to regulate the basis, method, manner and means of computing, exacting, imposing, paying and collecting the rates, charges, prices and tolls or other compensation of said company.

We are of the opinion that the legal rights and duties of the telephone company in respect to the use of "nickel first" and "nickel last" service, would not be controlled by the above mentioned orders of the City Council.

The further question is, whether the telephone company can be compelled by the passage of an ordinance so providing to furnish "nickel last" service where such service is desired by the subscriber.

The City in granting the telephone company permission to use its streets, alleys and public ways, had the right to impose in the ordinance granting such permission, whatever terms and conditions the City saw fit, so long as the terms and conditions imposed were beneficial to the public, and the company having accepted the ordinance and now enjoying its privileges, cannot escape the performance of the terms and conditions upon which its rights to the advantages and benefits conferred upon it are predicated.

People v. Suburban R. R. Co., 178 Ill. 594.

One of the conditions upon which the ordinance was granted was that the City reserved to itself the right from time to time during the period of the grant, by special ordinance amendatory of the ordinance of November 6, 1907, to regulate the basis, method, manner and means of computing, exacting, imposing, paying and collecting the rates and charges of the telephone company, and the telephone company by its acceptance of the terms and conditions of the ordinance, expressly consented and agreed to promptly accept, adopt and put into effect any reasonable rules and regulations relating thereto, which the City might by special amendatory ordinances, establish or prescribe from time to time after the expiration of thirty months from the time

the ordinance of November 6, 1907, went into force and effect. (Sec. 7 above quoted.)

The "nickel first" or "nickel last" service directly relates to the method, manner and means of computing, exacting, imposing, paying and collecting the rates and charges of the Company, which by the terms of the ordinance, are expressly made the subject of regulation from time to time by the City, such regulation to be made by means of an ordinance amendatory of the ordinance of November 6, 1907.

We are of the opinion that the City has the right to regulate this class of service by an ordinance amendatory of the ordinance of November 6, 1907.

Any regulation of the telephone service by the City, to be valid, should not be unreasonable.

Whether an amendatory ordinance providing that "nickel first" service should not be forced upon subscribers, would be unreasonable, would depend largely on whether the "nickel first" service is or is not an improvement on the "nickel last" service. If it is an improvement, an ordinance forbidding its use, except with the consent of the subscriber, would, in our opinion, be unreasonable, especially in view of the provisions of Section 5 of the aforesaid ordinance requiring the company to "adopt and put into use within the City of Chicago all available improved apparatus, appliances, equipment and methods of service."

If, on the other hand, the "nickel first" service is not an improvement, an amendatory ordinance forbidding its use, where not consented to by the subscriber, would, in our opinion, not be unreasonable, and its passage would be a valid exercise of the right expressly reserved to the City in the ordinance of November 6, 1907, and such ordinance, could, in our opinion, be enforced against the company.

Whether the "nickel first" service is an improvement is an engineering rather than a legal question and is a matter which you will doubtless be able to determine for yourselves.

Thus far we have dealt with the City's right to regulate the service in question by virtue of the terms and provisions of the ordinance of November 6, 1907, which is the

existing contract between the City and the Telephone Company.

Apart from that ordinance the City has a broad right of regulation of a quasi public corporation, such as the Telephone Company under the general police power which is vested in the City.

This power may be exercised where the subject of regulation affects the public safety and welfare. If the "nickel first" service is not an improvement and also endangers the public safety and welfare, the City Council would have the right, by a general ordinance applicable to all companies or persons furnishing telephone service in the City of Chicago, to forbid the use of the "nickel first" service within the City of Chicago.

We have prepared and send you herewith drafts of two ordinances, one of which is amendatory of the ordinance of November 6, 1907, and the other a general ordinance based upon the City's police power.

If you conclude to recommend the passage of an ordinance, only one of the ordinances drafted should be presented. The general ordinance should not be presented unless you are of the opinion that the "nickel first" service is not an improvement and also endangers the public safety and welfare.

Yours respectfully,

BRYAN Y. CRAIG,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JANUARY 22, 1912.

HON. EUGENE BLOCK, Chairman Sub-committee of Committee
on Local Transportation.

Dear Sir:

We have your request for an opinion as to whether the Calumet & South Chicago Railway Company has complied with its ordinance obligations in regard to the Hegewisch

& Riverdale extensions, and how the immediate construction of these extensions may be required or secured.

The Secretary of the Commission suggests a broadening of the second half of the request, so as to include an opinion as to what action lies with the City Council in case this railway company has not complied with its ordinance.

On March 30, 1908, a certain ordinance was passed, (Council Proceedings, page 4741) which provided for the Hegewisch and Riverdale extensions and which extensions were to be in operation by January 1, 1910, under the terms of Exhibit B of the ordinance, (Council Proceedings, page 4773).

Section 3 of the ordinance provides as follows:

“The Company shall not be authorized or obligated to construct any extension of its street railway system upon streets upon which street railways are not located when this ordinance goes into effect until the City has granted to the Company whatever authority in addition to this ordinance may be necessary to comply with the frontage consent laws of the State of Illinois.”

Prior to July 6, 1909, frontage consents for the routes specified in the ordinance for the Hegewisch and Riverdale extensions had been secured and on this date an ordinance was granted to the company which was “subject to all the provisions, conditions, requirements and limitations of the ordinance passed by the City Council of the City of Chicago on March 30, 1908, * * * and of Exhibit B thereof.” (Council Proceedings, page 1035.)

On page 928 of the Council Proceedings of same date appears an attested copy of the public notice asking for the passage of the ordinance and on page 798 of Council Proceedings of June 28, 1909, will be found the reference of frontage consents for verification for the Hegewisch extension and on page 756 of Council Proceedings of June 21, 1909, will be found the reference of frontage consents for verification of the Riverdale extension. On page 1134 of Council Proceedings of August 13, 1909, is the report of the Commissioner of Public Works showing a sufficiency of frontage consents as to both extensions.

We assume for the purposes of this opinion that the con-

ditions precedent to the passage of a valid ordinance for both extensions were complied with. The extensions were to be constructed by January 1, 1910, and upon that date had not been constructed.

The City Council undoubtedly had and has the right and power to waive the condition as to the time for completing the line, it being a provision in favor of the City to secure the public interests. The grant being a mere license, the City may for satisfactory reasons, waive a strict performance of the conditions.

The Chicago City Railway Company v. The People of the State of Illinois ex rel. Story, 73 Ill. 541.

Several alternative routes have been suggested by the people in the locality affected and by the railway company. This tentative change of routes is sanctioned under Exhibit B of the ordinance of March 30, 1908, in respect to the Hegewisch extension only and by certain amendatory ordinances in respect to the Riverdale extension.

The change of routes has been a subject of discussion for several years before your committee and various sub-committees. It is our understanding of the present situation which we will assume for the purposes of this opinion to be correct, that the company will not proceed with the installation of the extensions except upon certain conditions, which the committee declines to accede to.

From the foregoing it is reasonably apparent that the company has to all intents and purposes refused to proceed with the extensions authorized by the ordinance of July 6, 1909.

The provisions for forfeiture of the ordinance of March 30, 1908, are as follows:

“The Company further agrees that in the event that it shall make default in the observance or performance of any of the agreements or conditions herein required to be kept and performed by it, and if such default shall continue for a period of three (3) months (exclusive of all time during which the company may be delayed or interfered with, without its connivance, by unavoidable accidents, labor strikes or the orders or judgments of any court in any suit brought without its connivance), after

written notice thereof to it from the said City, then and in each and every such case, the said City by its City Council shall be entitled to declare this grant and all of the rights and privileges of the Company to maintain and operate street railways in any of the streets or public ways of the said City to be forfeited and at an end."

The time prescribed for completion has been regarded as of the essence of a grant and for the breach of such condition, the municipality in giving its consent, may expressly reserve the right to declare a forfeiture and revoke its consent; and when an ordinance contains such a provision the consent may be revoked, or a forfeiture declared by the municipality without even a judicial determination of the breach.

Dillon on Municipal Corporations (Vol. III, Section 1231, page 1965, 5th Edition).

Plymouth v. Chestnut Hill & N. R. Co., 168 Pa. 181.

Minersville v. Schuylkill Elect. R. Co., 205 Pa. 394.

Belleville v. Citizens' Horse R. Co., 152 Ill. 171.

Union Street R. Co. v. Saginaw Cir. Judge, 113 Mich. 694.

Tower v. Tower & St. R. Co., 68 Minn. 500.

In our opinion, therefore, under the facts above stated the railway company has made a default in the observance of the conditions to construct both the Hegewisch and Riverside extensions by January 1, 1910.

We think it is now within the power of the City to serve a written notice upon the company to perform the condition of the ordinance in regard to these extensions, and if the company shall make default for the period of three months after such notice (exclusive of the time during which the company might be delayed by the intervention of circumstances mentioned in the section) then the City will be entitled to declare the ordinance and all rights and privileges of the Company thereunder in respect to the maintenance and operation

of said railways in any of the streets of the City, forfeited and at an end.

Respectfully submitted,
 JOHN W. BECKWITH,
 MAX M. KORSHAK,
Assistant Corporation Counsel.

Approved:
 WM. H. SEXTON,
Corporation Counsel.

JANUARY 22, 1912.

MR. W. D. CASSIDY, Clerk, Municipal Pension Fund.

Dear Sir:

Your inquiry of the 3rd inst., in re "Municipal Pension Fund, Length of Service" has been referred to me for reply.

It appears from sections 1, 7, 8 and 9 of the Pension Act, approved May 31, 1911, that the only employes who are entitled to become beneficiaries under the Pension Act are those "who shall have been in the service of such city, village or town" for a specified period of time as provided in said Act.

I am of the opinion that those employes who have been in the employ of the city, village or town before annexation of such city, village or town, are not entitled to be given credit for the time of such services in determining whether or not they are entitled to a pension under the Pension Act in the annexing city, village or town, but that only the time served for the city, village or town in which a pension fund has been created can be considered in determining whether or not such employe is entitled to the benefits of such pension fund.

Yours very truly,
 LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:
 WM. H. SEXTON,
Corporation Counsel.

JANUARY 23, 1912.

W. D. CASSIDY, Esq., Clerk, Municipal Pension Fund.

Dear Sir:

Your inquiry of the 15th inst., first, as to the rights of a laborer who has filed an application to participate in the Municipal Pension Fund, to withdraw the same before any deductions have been made; and second, whether or not as a voluntary application he can at any time withdraw from the fund or refuse to make regular monthly contributions, is at hand.

Section 1 of the Pension Act in question, approved May 31, 1911, (Session Laws 1911, page 158), after enumerating those employees who are not included in the provisions of the Act, provides as follows:

“Nor to laborers unless any such laborer shall within six months after this Act shall be in force and effect, or in the event that any such laborer is now in the employ of such city, village or town, within six months after such laborer shall enter the service of such city, village or town, give written notice of his election to the board of trustees of said fund of his desire to participate in the benefits hereunder.”

In regard to the first question, a laborer who has once filed his application is thereupon, *eo instanti*, entitled to certain benefits under the Act with respect to a pension, and having acquired such benefits immediately upon the filing of his application, I am of the opinion that he can not after such filing withdraw his name irrespective of whether any deductions may have been made from his salary for pension purposes by the municipal authorities or not.

The deductions must necessarily be made in the due course of the fiscal administration of the particular department having that duty in charge, and may possibly be made at the end of the month in the routine of business. The deduction does not have to be made immediately upon the filing of the application, but is made at a regular, proper and orderly period, and the fact that such deduction may not have been made at the time when the applicant changes his mind concerning his desire to participate in the pension fund

will have no effect, in my opinion, to give him the liberty to withdraw the application when once made.

As to the second proposition, as to whether the applicant may withdraw or refuse to make his regular monthly contribution at any time, the provisions of the Act are mandatory upon the Comptroller to lay aside for the fund

“amounts of two dollars a month retained or deducted by the comptroller of such city, village or town from the salaries or wages of each employe * * *.”

The applicant has no control of the deductions nor any volition in the matter whatsoever. The statute compels the comptroller to make the deductions and these must be made whether the applicant agrees to it or not.

I am consequently of the opinion that the applicant cannot at any time withdraw from the fund, nor can the comptroller cease making regular monthly deductions as provided by statute.

Very truly yours,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JANUARY 24, 1912.

HON. HENRY STUCKART, Treasurer, City of Chicago.

Dear Sir:

This department has a communication from the Honorable John L. Whitman, Superintendent of the House of Correction of the City of Chicago, stating that one of the contributors to the House of Correction Employes' Pension Fund died a short time ago, and that the Board of Trustees of said Pension Fund has duly heard and determined the application of the widow of the deceased for benefits under an act entitled:

“An Act to provide for the setting apart, formation and disbursement of a house of correction employes' pension fund in cities having a population exceeding 150,000 inhabitants.” (Approved June 10, 1911.)

and that said board of trustees has directed that said widow be given the annuity provided in said act.

The foregoing being the first application for benefits under the act referred to, this department is asked to determine whether the City Treasurer, as custodian of the fund thereby created, would be justified in honoring the check issued by the Board of Trustees of said pension fund, at this time.

I have carefully examined the act referred to, and am of the opinion that the General Assembly of the State of Illinois had the power and authority to pass said act under the constitution of the United States and that of Illinois. (See *Firemen's Benevolent Association v. Lounsberry*, 21 Ill. 510.)

Section 3 of said act is in part as follows:

"The city treasurer, *subject to the control and direction of the board of trustees* hereinafter mentioned, shall be the custodian of said pension fund * * *."

The intention of the Legislature to give to the Board of Trustees control of said fund subject to the trust created by said act, is further manifested by the following provisions:

"Section 6 * * * Said Board of Trustees shall have power and it shall be its duty:

1. To make all payments from said pension fund pursuant to the provisions of this act.

2. To administer and invest, to purchase, hold, sell or assign and transfer any part of said pension fund remaining in the hands of said treasurer, or any part of the securities in which said fund, or any part thereof, may be invested, subject to the approval of the majority of the contributors to the said pension fund.

3. To pay all necessary expenses in connection with the administration of said fund and in carrying out the provisions of this Act for which provisions are not otherwise made."

* * * *

"Section 13. The chairman of the board of inspectors and the superintendent of the house of correction shall certify monthly to the treasurer all amounts deducted in accordance with the provisions of this Act from the salaries paid by the house of correction, which amounts, as well as all other sums contributed to said fund under the provisions of this Act, shall be set apart and held by said treasurer for the purpose hereinafter

specified, subject to the order of said board of trustees and shall be paid out upon warrants signed by the president and secretary of said board of trustees."

It is apparent from the foregoing that the City Treasurer is the mere custodian of the pension fund created by the foregoing act and that his duty to honor the check or draft of the Board of Trustees in the manner provided by section 13 hereinabove quoted is absolute.

Respectfully submitted,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JANUARY 29, 1912.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

I have your letter of this day stating that at the meeting of the committee held the 26th inst. the matter of making an appropriation of \$188,500 for voting machines was considered by the committee and that the ordinance making the appropriation is to be recommended to the City Council tonight.

You ask my opinion "as to the right of the board of election commissioners to incur this liability without an appropriation having been made therefor", and also "as to the duty of the City Council to make appropriations provided the board of election commissioners has the right to incur the liability."

The board of election commissioners of the City of Chicago was created under the act entitled:

"An Act to amend an act entitled 'An Act regulating the holding of elections and declaring the result thereof in cities, villages and incorporated towns in this state,' approved June 19, 1885, in force July 1, 1885, as amended by an act approved June 18, 1891, in force July 1, 1891, as amended by act approved April 24, 1899, in force July 1, 1899."

Hurd's R. S. 1909, page 984.

Section 1 of article VII of said act (as amended by act approved June 10, 1909) designates the salaries of the election commissioners, the chief clerk and one assistant chief clerk in Cook County and then provides as follows:

“ * * All expenses incurred by such board of election commissioners shall be paid by such city. Such salaries and expenditures are to be audited by the county judges, and such salaries shall be paid by the county treasurer, upon the warrant of such county judge, of any money in the county treasury not otherwise appropriated. And such expenditures shall be paid, by the city treasurer, upon the warrant of such county judge, out of any money in the city treasury not otherwise appropriated. It shall also be the duty of the governing authority of such counties and cities respectively, to make provision for the prompt payment of such salaries and expenditures, as the case may be.”*

Section 4 of said articles provides:

“At all city elections, general or special, though other than city officers may be elected at the same time with such city officers, and at all special elections in any part of such city, at which a city officer is elected, such city shall pay such judges and clerks of election for their services under this act.”

Section 5 of said article provides that:

“At all general county and state elections, which include officers elected through the whole county, though other than state and county officers are also elected, and at all exclusively judicial elections, and at all special elections for a county or state officer, or member of congress, or member of the legislature, such county shall pay such judges and clerks of election for their services under this act.”

Section 6 of said article provides that:

“Said board of election commissioners shall audit all the claims of judges and clerks of election, and shall draw a warrant therefor upon said city or county treasury, as the case may be.”

In this connection I call attention to my opinion of January 19, 1912, to the Mayor, printed at 2530 of the Journal of Proceedings.

Under authority of an act entitled “An Act to provide for the use of voting machines at elections, for casting,

registering, recording and counting ballots or votes; also creating a board of voting machine commissioners and defining its duties," approved May 14, 1903, in force July 1, 1903, (Hurd's R. S. 1909, page 1066) the board of election commissioners entered into a contract for the purchase of a certain number of voting machines. The proposition to adopt voting machines under its provisions had been submitted to the voters of the City of Chicago at a regular election held November 8, 1904, and a majority of all votes cast was in favor of said proposition.

Section 5 of said voting machine act is as follows:

"The local authorities, on the adoption and lease or purchase of a voting machine or voting machines, may provide for the payment therefor in such manner as may be deemed for the best interest of the city, village, incorporated town or county. They may for that purpose make leases, issue bonds, certificates of indebtedness, or other obligations, which shall be a charge on the city, village, incorporated town or county. Such bonds, certificates or other obligations, may be issued with or without interest, payable at such time or times as the authorities may determine, but shall not be issued or sold at less than par."

(*Id.*, page 1968.)

Construing together the provisions of section 1 of article VII of the act under which the board of election commissioners of the City of Chicago is created and in which its duties are prescribed, and of the voting machine act, in my opinion it is incumbent on the City of Chicago to pay the obligations incurred by the board of election commissioners in buying such voting machines.

I am further of the opinion that the board of election commissioners as the agent of the State, has authority in and about the holding of elections to incur any reasonable expense therefor; that such expense is subject to the audit of the county judge and that the liability thus incurred under the general election law, or under the voting machine law, is an obligation of the City of Chicago notwithstanding the fact that there may not have been prior appropriation therefor.

In other words, I am of the opinion that the provisions

of the Cities and Villages act prohibiting the making of contracts incurring liabilities, unless there is a prior appropriation therefor in the annual appropriation bill, do not apply to "expenses" incurred by the Board of Election Commissioners in the holding of elections.

Yours very truly,
WILLIAM H. SEXTON,
Corporation Counsel.

JANUARY 25, 1912.

HON. THEODORE K. LONG, Alderman, 6th Ward.

Dear Sir:

Your inquiry of the 22nd inst., with reference to an ordinance requiring theaters to print upon all tickets the price charged therefor, and providing a penalty for any one selling such a ticket for more than the price printed thereon, is herewith answered.

The precise question was determined adversely in *People v. Steele*, 231 Ill. 340, in which our Supreme Court held unconstitutional an act of the Legislature which sought "to prohibit the sale of tickets for more than the price printed thereon, and declaring same a misdemeanor, etc."

This department is now at work upon this matter for the committee on license and will be ready within a few days with an opinion defining the powers of the city over the keepers of theatricals and places of amusement. A copy of said opinion will be placed at your disposal.

Very truly yours,
NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JANUARY 30, 1912.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Complying with your directions I have redrafted the ordinance submitted to you concerning the employment of chil-

dren on the streets and in public places, in proper form for presentation to the City Council.

The ordinance contains some features which are of doubtful validity, although I have endeavored, while preserving its salient features, to bring it as near meeting all legal objections as possible. A number of questions will be opened up in case it is enacted and its validity is challenged.

It is likely that, in passing such an ordinance, a municipality may be assuming functions which the State only can discharge. Many authorities hold that the police powers of a municipality, within the limited sphere of its activities, are as complete as those of the state in its larger territory and jurisdiction. But this broad statement is, in my opinion, subject to considerable modification. Besides, laws of this character have been upheld on the theory that the children who are protected are the wards of the state. No such rule can be invoked in the case of a municipality. Hence, the whole subject, involving the constitutionality of such enactments, the respective functions of state and city, the difference between the police powers of each, the conflict of jurisdiction between the Municipal Court of Chicago and the Juvenile Court, and many other questions, is thrown open.

Aside from these general questions, I had considerable doubt as to whether it was proper to make a discrimination between the ages of boys and girls, because such discrimination, in the case of this ordinance, is based on considerations of morality, rather than on physiological and hygienic conditions such as make a similar discrimination valid in laws which draw a distinction between the sexes. At the urgent request of the Juvenile Protective Association, however, it was deemed advisable to draft the ordinance in such a way as to make this distinction, and to permit them to undertake to effect its passage. These parties have made a special study of the evils which such a law is designed to remedy, and declare that anything short of what is now contained therein would very much detract from the value of the proposed enactment.

The draft submitted to me provided for the appointment of a special officer. I regard the matter as properly within

the province of the Commissioner of Health, since the physical condition of an applicant for a permit and badge must be gone into. I have therefore designated the Commissioner of Health as the official to issue the permit and badge provided for, and this seems to be acceptable to the parties interested in the passage of the ordinance.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JAN. 30, 1912.

HON. HENRY ERICSSON, Commissioner of Buildings.

Dear Sir:

You have submitted a number of questions to me on which you desired answers, stating when you did so that you did not care for any opinion giving reasons and citing authorities.

As I understand it, these questions are matters which have come up in times past, and are likely to come up, relating to the ordinances, which have puzzled you and the members of your staff, and you would like my interpretation of the ordinances covering the points in question in order to arrive at a better understanding of the meaning of the sections. I have therefore numbered these questions in the order in which you gave them to me and refer to them in their regular order, and after each question make a brief statement in which I give you my view on the point.

1. Is the code violated when a building of Class VI is built on a corner lot with an open space at the side serving as a yard but has no yard at the rear, due to the existence of an adjoining shed?

The Code seems to allow no discretion in this matter. When a building of Class VI is built on a corner lot it must have a yard in the rear. Section 441 requires this and specifies particularly what percentage of the superficial area of the lot must be reserved for that purpose. It may be that occasionally an instance may arise where there is some doubt as to

which side of the lot is to be considered the rear, although section 437 says that where the two frontages are of unequal length the lesser street frontage shall be taken as the width of the lot.

In spite of this section, it would seem to me that occasionally the question would arise on account of the way buildings are placed so as to front on both streets. In such case it may be that a yard of sufficient size on the side will answer all requirements.

Aside from such cases, it is quite clear that the ordinance contemplates that the yards should be at the rear end of the lot, as such corner lot is defined. An adjoining shed is an obstruction contrary to the ordinance, which expressly says that such yard shall be open and unobstructed from the earth to the sky.

2. Is the capacity of a building of Class IVb containing a hall of 1,000 capacity and other rooms of more than 500 capacity to be considered as having a total capacity of over 1,500 persons and therefore to be entirely fireproof construction? (In this hall the seats are not fixed.)

I assume that the words of section 304 which are puzzling are the following:

“If a hall or room or halls or rooms have a total seating capacity of more than 1,500 persons such building shall be built of fireproof construction.”

I understand this sentence to refer to halls or rooms used as public audience rooms or for other purposes where a number of people gather to remain some time, such as lodge halls, dance halls, etc. Section 280, in speaking of Class IVb, mentions a number of different kinds of halls, and it very often happens that more than one of these is contained in a building.

All such public halls should be grouped and their capacities added together in determining the total capacity of a building, but the ordinance does not contemplate that the capacity of other rooms used for office or business purposes or as living rooms should be included. Otherwise, in case a comparatively small room were located in a building of which the lower floors were occupied by stores it might be required to be of fireproof construction when there is no occasion for it

whatever. I do not think the ordinance admits of such a construction.

Inasmuch as the seats are not fixed in the hall of which you speak and which has given rise to this inquiry, I would say that a hall of 1,000 capacity such as this might require a more specific opinion since the ordinance ought to be rigidly enforced with regard to the seating of so large an audience.

3. Is there a violation of the code when a permit is granted for a building upon plans regularly prepared by a licensed architect for a similar building in another location, the only difference being the address, which has been changed by the person obtaining the permit who acts without knowledge of the architect who prepared the original plans?

There would be no violation of the code if a permit were granted for a building to be erected on a lot of identical size and similar situation even if the plans originally prepared were intended for a building at some other location.

Section 238 does not confine the plans to any particular location, and section 239 indicates how section 238 should be construed; that is to say, it is not permissible to make any departure from the plans as approved by the Commissioner of Buildings of such a nature that it involves a violation of the requirements of the ordinance.

If, therefore, the same plans will apply with equal propriety to some other lot, there has not been such a change made as constitutes a violation.

Section 436 requires the filing of a plan in the case of buildings of Class VI, but that is clearly intended for the purpose of enabling the commissioner to ascertain whether the provisions with regard to courts, yards, light-shafts, vents, etc., are complied with, and nothing contained therein indicates that the location of the particular lot is necessary, as long as the plan shows the dimensions and situation of the lot itself and the position to be occupied by the proposed building or buildings.

4. Does the code allow the occupancy of any floor above the 2nd floor as a separate living compartment in frame buildings erected before the adoption of the code?

This question has to do with the construction of section

654b of the code which provides for the erection of new frame buildings outside of the fire limits, and prohibits any portion of such new frame building above the second floor from being used as a separate living apartment. This question is governed by section 514, relating to alterations in existing buildings, so far as that goes, also by section 473.

Between these two last mentioned sections the powers of the department of buildings with regard to existing buildings are fairly well defined. Aside from what is stated in them, however, I call attention to section 462, inasmuch as the use of an upper story as a separate living compartment would make such a building come within the definition of tenement houses, or Class VI buildings.

Therefore, section 462, relating to stairways in existing and new tenement houses, must be complied with so far as the use of the property is concerned. If these sections are complied with its use can not be limited so as to exclude the use of an upper story as a separate living compartment, since such a construction would deprive the owner of property without due process of law.

In other words, while every precaution for safety which the ordinance prescribes may be enforced it can not be said that a building which was constructed for such purpose before the present building code was enacted can be legislated out of use.

5. What class of building does a two story building belong that is occupied at the 1st floor by a store and at the 2nd floor as a residence? The store portion would undoubtedly be Class I, but would the 2nd floor be Class III or VI? Section 240g defines Class III buildings as “* * * every building used as a family residence” * * * which would seem to apply. But section 274 reads, “In every building hereafter erected for or converted to the purposes of Class III, every habitable room shall have a window or windows * * * opening onto a street, alley or yard * * *; *provided, that there shall be a space of at least three feet between the building and the lot line on one side, and a space of at least one foot between the building, and the lot line on the other side.* The store portion can be built up to the lot line, but is it expected that the residence portion be offset this one foot from lot line on one side and three feet on

the other? This has never been done in all the buildings I have seen. On the other hand, suppose, by a stretch of construction of the ordinance, it is interpreted that this 2nd story portion is Class VI. (This would be done by considering the occupant of the store as a family.) Then, under this interpretation, the building in its second story portion could be built to the lot line, provided that light courts be connected to streets, alley or yards as required in section 442.

Before answering the above question I wish to call your attention to the fact that the portion of your question which is underlined, beginning with the word "provided", is not a part of the ordinance. Section 274, as it appears in the code, does not contain these words. It is true that on February 20, 1911, the words were added by an amendment to the ordinance as it stood at that time, but since then the code was enacted as one ordinance and all former ordinances, except those that are specifically excepted, were repealed; hence the clause in question is not now a part of our ordinances.

The class of buildings you speak of is a combination of classes I and VI. Class III is intended to include only what are ordinarily spoken of as "dwellings", that is to say, a building which is occupied as a residence by only one family and for no other purpose, the words "a family residence" being intended to mean "one family residence."

Not only is this a reasonable construction to be placed on this classification, in view of all the requirements relating to Class III, but there is specific authority for this construction in sections 455 and 456. These sections speak of "tenement houses" of which the first story contains a store or stores and refer to such buildings less than three stories in height. Consequently they include the very class of buildings of which you speak.

Section 241 governs this class of buildings used for the purposes of more than one class. It provides that, where there is a conflict between the provisions of the chapter on buildings of two or more classes, the provisions which relate to and govern the construction of buildings of the class requiring the best and safest form of construction shall govern the entire building.

While, therefore, the requirements of Class I so far as the stores are concerned, may govern in some respects, everything relating to the construction of the second floor at least must be governed by the provisions relating to Class VI. The requirements of section 442 with regard to light courts, so far as they apply to such a building, must be followed out.

6. Section 277 (Class III buildings) reads, in part, "Light shafts *wholly within the walls* of a two story building of Class III may be built of combustible material covered with sheet metal or other incombustible material." How is "wholly within the walls" to be interpreted? Would a lot line court be a court "wholly within the walls?" Have seen many such courts and plans have been approved upon which such courts have been shown.

Section 277 applies to light shafts and not to lot line courts. I see no objection to courts in buildings of Class III whether they are lot line courts or open courts. They are not prohibited. All that the section in question provides for is that in case a light shaft within a building of Class III is constructed it may be built in the manner therein described. There are no words which in any way bear on lot line courts in said section.

7. Does a skylight over a pantry or toilet room equal a window of same area as called for in sections 276, 448b and 448c?

A skylight can not be substituted for a window. Such window in the case in question is intended for purposes of ventilation, and while a skylight may supply as much light, it can not take the place of a window where the end desired is the proper ventilating of a compartment.

It is for purposes of ventilation that air ducts are required in other parts of the ordinance and it will be readily seen that no opening upwards would take the place of air ducts. The same rule applies with regard to the above section. Moreover the sections explicitly state that such windows shall open upon a street, alley, yard, court or vent-shaft, and therefore, there is no room for such discretion as you suggest in your question.

8. If a building line is established on a street does

the part between the building line and street line enter into the unoccupied portion of lot as required in Class VI buildings?

The part of the lot extending between the building line and the street must be considered in estimating the percentage of the whole lot covered by the building. I find no words in section 440 covering this proposition which warrants any other construction.

On the other hand, section 441 provides for a certain amount of space in the rear of the lot which is to remain open and unobstructed from the earth to the sky, and it may be assumed, therefore, that this provision was designed to cover a case where the unoccupied portion of the lot in front of the building would constitute so large a percentage of the whole lot that inadequate room would remain at the back. In this way the unoccupied portion of the lot could include the area between the building line and the street and still not interfere with the proper construction of the building.

9. Section 439 (Class VI buildings) reads in part * * * "Where a tenement house, now existing or hereafter erected, stands upon a lot *other than a corner lot*, no other building shall hereafter be placed upon the front or rear of that lot, unless the minimum distance between such buildings be at least ten feet, if neither building exceeds the height of one story; or fifteen feet if either building exceeds the height of one story, but not the height of two stories; and so on * * *." The underscored words above leave corner lots uncared for in this particular. Buildings on corner lots can be and are being built right against each other. Does the ordinance so intend?

The section quoted above so plainly excludes corner lots that there can be no question about its meaning or intent. There seems to be reason also for making such an exception. The space between the buildings is designed to provide light and air, and it may be assumed that this is amply provided for in case the building stands on a corner lot.

I beg to call your attention to the fact that there is a misprint in the code in the 11th line of section 439. I suggest that you submit an ordinance amending this section since this misprint is likely to cause confusion at some time in

the future, the code being the law and not the building ordinance as passed shortly before the enactment of the code.

10. Section 440 (Class VI buildings) reads in part, "No existing tenement house shall hereafter be enlarged nor its lot be diminished, nor other buildings be placed on its lot, nor a tenement house be moved on a lot on which there is an existing building, so that after such change a larger proportion of any corner lot or other lot upon which it is situated is covered by buildings, than the following proportions, respectively: *No new tenement house* alone or with other buildings now or hereafter erected, shall occupy above the first story more than eighty-five per centum of the area of a corner lot, * * *". The first portion of this section protects lots occupied by now *existing tenement houses* from encroachment by other buildings of any kind whatever, but the second portion after the colon and beginning with the under-scored words protects only such lots as are to have new tenement houses upon them. Take a concrete example: A three story tenement house occupies the front portion of the lot on the S. W. corner of Western avenue and Hirsch street. A new one story building to be occupied by three stores (Class I Buildings) is now being erected on the rear portion and the remainder of this lot. When this is completed not one square foot of this lot will be unoccupied. Does section 440 permit this? If it does not, how can cases of this kind, if the inspector does not report them, be detected? Class I buildings do not require a surveyor's plat to accompany the plans.

When you assume that the first portion of the section protects lots occupied by existing tenement houses from too great an encroachment by other buildings and that this is negatived by the words that appear after the colon you misinterpret the section.

The first part stands just as you interpret it. The second part is intended to mean that it can not be applied to conditions existing at the time of the enactment of the code. That is to say, if at the time the ordinance was passed a tenement house with other buildings occupied more than the proper proportion of a lot, no change could be ordered, but in case of encroachment or alteration or the building of a new tenement house thereon, provision could be made against occupying more than the proper percentage of the lot. That

is the purpose of the word "new" in the portion which follows after the colon.

It would take considerable space to point out just how I arrive at this interpretation, but I am convinced that is the correct construction of the section.

You speak of a concrete example at the S. W. corner of Western avenue and Hirsch street, where a new one story building to be occupied by stores is being erected on the rear portion of the lot in such a way that it will occupy the entire lot. I see no objection to this, so far as section 440 is concerned, which only prohibits the building of structures in such a manner that they occupy more than eighty-five per cent. of the area of a corner lot above the first story.

It seems, however, that this is a violation of section 441, which requires a yard with an area of at least eight per cent. of the entire area of the lot in the rear of tenement houses on corner lots. In case this lot was occupied by stores on the first floor all around, it would seem as though the provisions of section 440 relating to the space to be kept open above the first floor would be the only ones to apply since there is no limitation on store buildings, and the lower part of the structure would have to be construed as a store building, but since you say that this is a three story tenement house, I assume that there are no stores on the first floor of the corner house, and consequently the provisions of section 441 apply.

You ask how cases of this kind can be detected if the inspectors do not report them, since Class I buildings, when permit is applied for same, need not have a plat accompany the same. In response to this I can only say that if no proper provision is made for a yard as required by ordinance, even though a permit is issued, without knowledge on the part of the Commissioner of Buildings that there is to be a violation of the ordinance, then a prosecution will lie against the person who is constructing the building in question.

11. 239b reads, "No contractor or builder shall begin *any work* on any building or structure for which a permit is required by this chapter until such permit shall have been secured." Would excavating for foundations be considered *any work*? Inspected one job (N. E. corner Logan boulevard and Campbell avenue) where excavation

was being done without building permit or approved plans.

In case a person desiring to construct a building finds it possible or feasible to start digging on his lot without obstructing the street or otherwise interfering with the rights of other persons or the public, nothing can be done to prevent him from proceeding with the work, unless he uses the sidewalk or portions of the street adjoining his property in such a way as to interfere with its use by the public. Digging on his lot can not be construed as beginning work on a building or structure. In fact it can not be assumed that he is going to construct a building simply because he digs on his lot.

This rule, however, is not absolute and in case a person digs deep enough to draw water from other premises in the neighborhood he can be stopped and required to secure a permit before he proceeds, as for instance, if he digs to sink caissons. In such a case he might interfere with the rights of the public or other persons just the same as if he cut open the sidewalk or littered the street with building material.

While, therefore, in the abstract, a party possesses the right to excavate without a permit, it would seem that practically he can not do much of this kind of work without encroaching on the rights of others, and therefore he would usually be compelled to secure a permit.

12. 230d reads, "In all cases, the approved plans, together with building permits, must be kept on the job while the work is in progress." Does this mean that the approved plans, etc., must be on the job while any work (mason, carpenter, lathing, plastering, etc.) is in progress? The mason usually is the only man who has the approved plans and the plans usually are torn and destroyed by the time he is through.

The portion of the ordinance above quoted clearly means that the approved plans must be kept on the premises while the construction work is in progress. It seems plain that the intent is that it should be made easy for an inspector to see whether or not the permit is being complied with. It would be impossible for him to know whether the building is being constructed in accordance with the plans on which the permit was issued unless the plans were accessible. Such plans

should therefore remain on the premises as long as there is something left for inspection, in other words, until the building is completed.

13. Section 249b reads, "All of the partitions between the parts of such buildings occupied by different persons, firms or corporations, shall be built of incombustible material from the floor to the floor boards or roof boards next above such story or stories so occupied." Suppose there are living rooms in the rear of the store, does the partition between the store and the living rooms have to be of incombustible material according to this section?

Section 249b does not require that there should be a wall of incombustible material between a store and living rooms in the rear. Paragraph a of this section also covers this point. It requires a wall of noncombustible material extending the entire length of the building at certain intervals. This could hardly be looked upon as a practicable requirement where there would have to be an opening in same as in the case of living rooms at the back of the store.

14. The plan given above is a plan of a type of double buildings that have been, and are at present being, erected on the west side between Division street and North avenue and Milwaukee and Western avenues. Just how to treat this type of buildings is a problem with me.

(1) Is this to be considered as two separate buildings? If so, then, 1st, 10 ft. should separate two story building and 15 ft. three story buildings (I have not found this to be the case), and 2nd the rear apartments would have no interior stairway as the ordinance requires.

(2) Or does connecting wall shown make the buildings one? If so, this court would be a lot line court. But the definition given for "court" is, "an unoccupied, *unobstructed* space, other than a yard, on the same lot with a tenement house." The "court" then would only be that portion marked "areaway" on the plans given above. Then for a 3 story building (all that I saw were such) 80 or 60 square feet of areaway would be required. I found no building with an areaway so large, most of them were about 40 or 50 square feet.

And, again, the stairway in this court would have to be inclosed in a brick wall on *both* sides to be counted as an interior stairway. And it is necessary that it be so counted for the ordinance (section 462) very specific-

ally says "Every now existing and every new tenement house shall have at least two flights of stairs * * * none of said stairways must be an interior stairway * * * and every apartment shall be directly accessible from both such flights of stairs without going through any other apartment. * * *"

One other question with these buildings has to do with vent shafts. The 6 sq. ft. that is required for pantry vent shafts and the 27 sq. ft. that is required for other vent shafts, shall this area be arrived at by taking the length times the actual brick opening, or the length times the distance from the back of the shaft to the *lot line*. And when on lot line what will the character of the ventilating duct of the shaft at its base be. So far I have found no such ducts.

As a part of question 14 you have submitted the draft of ground plan of a certain type of building which is apparently located on a single lot with a three foot passageway on one side and six inches of open space on the other side. The building consists of a front and rear building connected on one side by the outer wall. There is a platform connecting the two buildings and an outside stairway between the buildings as well as in the rear, also a platform and porch in the rear. A small areaway extends between the two buildings aside the platform between them. Each one of the two buildings thus connected also has a small lot line court. Concerning this you ask the above questions.

In answer to the first of your questions I would construe the building in question as one building by reason of the continuous wall running the entire length of one side of the same. Therefore, the ten or fifteen foot space required between buildings is not necessary.

On the other hand, the requirements of section 462 must be strictly complied with. That is to say, there must be two flights of stairs and one of them must be an interior stairway. Both must be directly accessible to each apartment. I understand your plan to indicate that there are two outside stairways in this case and your objection is that the rear apartments have no interior stairway. I do not think this objection will hold in case the rear apartments have access directly to the stairway in front, otherwise it would.

In regard to the second point you make, the space between the two buildings connected by the wall would have to be construed as a lot line court. The areaway should be the full size required by the ordinance, exclusive of stairways and platforms. In case the building in question has not sufficient areaway it is a clear violation of the ordinance.

As for the stairway in this court, I have already partly covered same in the point above by showing that if there is direct access to the interior stairway from the rear apartments the ordinance is complied with. I judge from your plat, however, that there is not such a complete compliance as is contemplated by the ordinance and I think you would be justified in requiring the stairway in the court to be enclosed with masonry. If that were done then every requirement would be fully met.

With regard to the last question you ask concerning this class of buildings, I would say that there is a sufficient compliance if the measurement is taken from the back of the shaft to the lot line. Such vent shafts are for purposes of ventilation and necessarily there is more ventilation in case there is an open space of six inches extending the entire length of the building than if the vent shaft were inclosed the additional six inches by a wall.

I would also assume that in a case of this kind where a vent shaft opens right out upon the open air from top to bottom no ventilating duct is required. That would appear to me a common sense construction of the ordinance relating to the points involved.

15. Can that part of section 246, that reads: "No door when open shall project over a public sidewalk," be strictly enforced? Have seen dozens of violations of this section.

In regard to this I can only say that no plans should be approved which do not meet the requirements of the ordinance. The ordinance could not be strictly enforced on existing buildings since all that would be necessary to bring them within the requirement would be to keep the door closed except when in use. No ordinary use of a door opening and closing on a public thoroughfare would constitute a nuisance

which could be abated. In fact it is hard to conceive how any one could be punished for violating the ordinance if by some chance a door projects over the highway when it is opened, provided it is not kept open. It is proper, however, to refuse permits unless the doors open as required by ordinance.

16. If a man gets an easement of an adjoining portion of an adjoining lot, can he use that portion for light court purposes?

Section 442 seems to govern this point. It states that the lot line courts provided for by ordinance shall be as provided therein, "irrespective of the presence of or dimensions of courts on other premises bounded by the same lot line." If this were not the case, you can readily see how the ordinance could be evaded by securing an easement for the purpose of constructing a building on one lot, and then, by a new contract between the owners of the two lots, doing away with the easement. The provisions relating to light courts would be rendered nugatory. If such an easement were of so permanent a character that it might be construed as an extension of the lot, and the records showed the same to be such, so that for all practical purposes the lot line was on the other side of a passageway, then my construction of the requirements of the ordinance might be different. That, however, need not be taken into account in issuing permits, and it is only in case a showing of such perpetual easement is made that it need be considered.

17. If a second story is built upon an existing one story building, which building is up to lot line on one side, can windows be put in the new wall on lot line side for buildings of Class III and VI?

I know of no provision of the ordinance which prohibits windows in any wall of a building, provided the same does not weaken the wall so that it does not meet the requirements of the ordinance. There must be windows which comply with sections 274, 473, 475, 476 and other sections of the ordinance prescribing size and position of windows for various rooms. When this is done, there is nothing to prevent additional windows being put in on the lot line side of a building if the builder desires them there.

18. Section 274 (b) reads, in part: "In every building hereafter erected for, or convenient to the purposes of Class III, every habitable room shall have a window, or windows, with a total glass area equal to at least one-tenth of its floor area, opening on to a street, alley or yard, as defined in Section 432 of this chapter; provided that there shall be a space of at least three feet between the building and the lot line on one side, and a space of at least one foot between the building and the lot line on the other side." Is this to be interpreted that windows can be placed on the one foot side? Would windows on a court be accepted?

The word "yard" as defined in section 432 "is an open, unoccupied space which separates every part of the building from the rear line of the lot." I would understand this to mean that only such portions of the space entirely clear of the rear of the building is to be considered a yard, and where there is a one-foot space on the side of a building it is not to be construed as a part of the yard. In my opinion it was the intention of the ordinance to prohibit windows opening on this one-foot space, unless they are extra windows not required by ordinance.

I beg again, however, to call your attention to the fact that you misquote section 274, which does not contain the provision that you speak of in the printed edition of the code.

In regard to the windows on a court the ordinance seems to be plain on that. If the same is an open court, a window opening on that comes within the provisions of the ordinance. Otherwise not.

19. Section 658 reads in part: "A frame building may be raised for the purpose of erecting a basement or story, or both, thereunder. * * * The walls enclosing such basement or story, shall be of masonry, and not less than twelve inches thick, excepting that when a one story frame building is raised, and has a basement only built thereunder, the masonry wall of such basement may be eight inches thick above grade and twelve inches below. The thickness of walls hereinabove required, shall, also, apply to brick walls in new frame buildings." This section, as I interpret it, requires, unconditionally, that all basement walls of frame buildings, be of masonry. But section 654 (b) reads, in part: "Outside the fire

limits, it shall be lawful to erect frame buildings not exceeding forty feet in height from the sidewalk to the highest point of roof; if such frame buildings have a basement of masonry, their height above the sidewalk may be made not to exceed forty-five feet." This section by inference, would permit frame basement walls.

You are mistaken when you interpret section 658 as requiring all basement walls of frame buildings to be of masonry. Such requirement only holds in case an existing frame building is raised, otherwise not.

I assume this explains the difficulty that you encounter in section 654 which permits the erection of frame buildings outside of the fire limits.

In case any of the above answers require further explanation, or if you desire any reasons for the interpretation that I give, I shall be very glad to go into same more fully.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JAN. 30, 1912.

HON. JOHN McWEENY, General Superintendent of Police.

Dear Sir:

We are in receipt of your communication of the 25th inst., inquiring whether bar permits should be issued for unlicensed halls.

Section 1546 of the Chicago Code of 1911 in respect to bar permits is as follows:

1546. "The Mayor of the City of Chicago is authorized and empowered, upon written application, accompanied by a good and sufficient bond and the payment of a fee as hereinafter provided, to issue a bar permit for the sale or dispensing at retail of vinous and malt liquors, to any corporation, voluntary association or society of persons organized in good faith for fraternal, educational or charitable purposes, or to any person or persons for such sale or dispensing at retail of vinous and malt liquors

at any gathering or entertainment held by any such corporation, voluntary association or society.”

Under the provisions of Chapter VI of the Chicago Code of 1911, entitled “Amusements” all halls, structures and buildings where dances, amateur theatrical entertainments, bazars and other entertainments of like character are carried on or engaged in for gain, or for admission to which the public is required to pay a fee, are required to be licensed.

If such a hall is being operated without a license, a bar permit issued for the sale or dispensing of liquors at a gathering or entertainment to be held at such place would be a grant of permission to sell and dispense liquors at a gathering or entertainment to be held at a place which should be, but in fact is not, licensed to be used for the purpose of such gathering or entertainment.

We are of the opinion that the issuance of a bar permit under the circumstances mentioned would not be consistent or advisable and that bar permits should not be issued for the sale or dispensing of liquors at gatherings or entertainments to be held at public halls which are unlicensed.

Yours truly,

BRYAN Y. CRAIG,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JANUARY 30, 1912.

HON. JOSEPH F. PEACOCK, City Real Estate Agent.

Dear Sir:

Replying to your request for an opinion in regard to the City's right to lease property condemned by the City for a certain specific purpose, I desire to inform you that this question has been decided in many cases and the decision in each case was based upon whether or not there was an intention on the part of the City to abandon the property condemned.

Lewis on Eminent Domain, Vol. 2, page 1053, in discussing this question says:

“Permitting a temporary use of the property for other purposes than that for which it was taken is not an abandonment, even though such uses may be of a purely private nature.”

Likewise in the case of *Curran v. City of Louisville*, 83 Ky., page 628, where an action was brought in 1879 by the appellants who seek to recover the possession of lots condemned and the assessed value of which they received from the City upon the ground that the right or perpetual easement acquired by the City had been lost by non-user and abandonment. The City had been in possession of the lots since they were condemned in 1867 for the building of a city or canal basin and a wharf in connection with it adjoining the Ohio river. It had been impossible for the city to raise the necessary money for the construction of the basin and for two or three years prior to the bringing of these suits, it leased a small portion of the land free of rent for ten years to a glass company for temporary purposes and it had erected temporary buildings upon it. The remainder of the property had been used by the city as a dumping ground. When these suits were brought negotiations were pending but not concluded between the city and a railroad company for a lease of the property to it for a term of years. The court in giving its decision, on page 632, says:

“The question next arises whether the acts of the city show an abandonment of the right it acquired by the condemnation. To have this effect they must be of a conclusive character, and clearly established by the evidence they must show an intention to abandon the intended use. * * * No acts upon its part are disclosed by the evidence which disable it from using the property in the future for the use for which it had been condemned. Those of which the appellants complain manifest the city’s intention to hold the possession against the appellants instead of showing an intention to abandon the right.”

Also the case of *Roby v. New York Central & Hudson River Railroad Company*, 142 New York reports, page 176. This was a case in which a railroad company condemned certain lands for the purposes of a railroad track. In April, 1889, the defendant and Arthur G. Yates entered into an

agreement whereby the defendant made a lease to Yates covering the land in question and other lands in the same vicinity, for a term of fifteen years from the first day of May, 1889, at an annual rental payable quarterly. It provided in the agreement that the land covered by the lease was to be used only for a coal yard and trestles for the purpose of receiving and handling coal transported over the railroad of the defendant. It reserved the right to terminate the lease at any time upon giving six months written notice, and Yates covenanted not to assign the lease or underlet the premises or any part thereof. The court in rendering its opinion, on page 181, says:

“An easement may be abandoned by unequivocal acts showing a clear intention to abandon, or by mere non-user, if continued for a long time. The mere use of the easement for a purpose not authorized, the excessive use or misuse, or the temporary abandonment thereof, are not of themselves sufficient to constitute an abandonment. (Citing cases.) Under these authorities the acts claimed to constitute the abandonment of an easement must show the destruction thereof, or that its legitimate use has been rendered impossible by some act of the owner thereof, or some other unequivocal act, showing an intention to permanently abandon and give up the easement. Here there were absolutely no acts of the kind mentioned. The defendant could put an end to the lease to Yates at any time by giving six months' notice. It continued to use the track passing over the land in question for railroad purposes, to wit; transportation of coal to Yates and it actually reserved the use and control of the track and land for all railroad purposes. I can assert with great confidence, after a diligent examination of the books, that no authority can be found holding that upon such facts an easement has been absolutely lost to the owner thereof.”

In the case of *Corr v. Philadelphia*, 212 Pennsylvania reports, page 123, the statement of the case averred as follows:

Subsequently it appearing that the land was unsuited for the purposes of a reservoir, the defendant abandoned the site and let the land, which is the subject of this suit, for farm purposes. The defendant has utterly failed in any particular to use said land for a reservoir, a pumping station or any

other purpose whatever connected with the supply of water to the City of Philadelphia; nor has it put the said land to any other public use, and *has utterly abandoned any intention which it might have had to use the said land.*

The lower court sustained the demurrer to said averment and entered judgment for the defendant, and upon appeal the court said, on page 124:

“An abandonment of land appropriated by a municipality for public use, cannot be established by proof merely of a failure for a time to use it, or of a temporary use of it not inconsistent with an intention to use it for the purpose for which it was taken, or another public purpose. The facts alleged in support of the averment of abandonment do not strengthen it. But there is a distinct averment of an actual abandonment of any intention to use the land for any public purpose. This, we think, was a sufficiently well pleaded abandonment to put the city to a defense.”

The same question of abandonment and non-user was before the Illinois Supreme Court in the case of *Durfee et al. v. P. D. & E. Railway Company*, 140 Ill. 435, and in this case the facts are as follows:

The land involved in the proceeding, as appeared from the evidence, was condemned, and Durfee, the owner, was paid \$3,050 for the right of way. After acquiring the right of way the company constructed its road upon it and used it in running its trains to and into Decatur, from 1871 to 1880. In the spring of 1880 the company entered into a contract with the Illinois Central Company, under which it acquired a right for a period of ten years to use the tracks of the Central Company. After this contract was made the company ceased to use the right of way in question and the rails and railroad ties were removed and the right of way was fenced up with other adjoining lands. The question presented was whether these acts constituted an abandonment of the right of way on the part of the railroad company.

In delivering the opinion of the court, Justice CRAIG, on page 439, says:

“It appears from the testimony of Bradbury, the general manager of the road at the time the contract was made with the Illinois Central Company, and also from

the evidence of Ewing, who succeeded Bradbury, that the railroad company had no intention of abandoning the right of way. This is confirmed by the evidence of the chief engineer, who testified that the intention of the company ultimately was to resume the running of trains over the old right of way. Under this evidence we perceive no ground whatever upon which it could be held that the railroad company had lost its right of way by abandonment. It is conceded in the argument, to constitute an abandonment there must be *non-user* and an intention to abandon. Here was a *non-user* for a definite and fixed period of ten years, with no intention to abandon permanently the right of way, and we are aware of no authority under which it can be held the railroad company lost its right of way under such a state of facts. In *Barlow v. Chicago, Rock Island and Pacific Railroad Co.*, 29 Iowa, 276, it was held that the railroad company did not lose its right of way from a failure to occupy the land acquired for that purpose, for a period of thirteen years; and in *Columbus v. Cincinnati Southern Railroad Co.*, 37 Ind. 294, where the railroad company had entered into a contract with another company for the use of a part of its track, it was held that the taking up of the rails from a part of the track and removing them to a new track did not constitute an abandonment."

In *Stannard v. Aurora, Elgin and Chicago Railway Company et al.*, 220 Ill. 469, where the question of abandonment of an easement by a Railroad Company is raised, the court says, on page 473:

"Nor does the bill set forth facts showing an abandonment of the route in question, but alleges the same merely as a conclusion of the pleader. It is alleged that the railway company has constructed its railroad on other strips of land, or has acquired another right of way, or has done other acts from which an abandonment might be inferred. The bill shows that the company is in possession of that part of the strips conveyed which is seventy-five feet wide and has never had possession of the remainder of the tract conveyed, but that the appellant, and the cemetery company by his authority, have had the possession of the remainder thereof. The bill shows that the railway company, by its original name and also by its present name, has executed trust deeds covering the whole of the strips in controversy; the second trust deed being dated September 1, 1903, and both trust deeds having been recorded in the early part of the year 1904.

These facts are inconsistent with the idea of an abandonment, and, instead of aiding the conclusion alleged, have a tendency to contradict the conclusion. To constitute an abandonment by a railway company of any part of its right of way there must not only be nonuser, but an intention to abandon the same."

From the above decisions it appears that the court in deciding whether or not any of the acts done by the owner of the easement was inconsistent therewith, sought to determine whether or not the acts showed an intention to abandon the use of the easement.

This department holds that by virtue of Section 15, Chapter 7 of the Act of February 23, 1863, generally known as Chicago Charter of 1863, the City has acquired the title in fee simple to all property obtained by condemnation proceedings since the passage of that Act. We realize that in the case of *Sears v. The City of Chicago*, 247 Ill. 204, the Supreme Court held that the City acquired only an easement in a street obtained by condemnation in 1887, but it is to be noted that in its decision the court failed in any way to mention or pass upon the question of whether or not the provisions of the Charter of 1863 above referred to is still in force. Until this point has been definitely decided upon by the Supreme Court this office will continue to hold that the City has obtained title to property in fee simple absolute to all property taken by condemnation since February 23, 1863. In view, however, of the present unsettled condition of the law due to the decision in the *Sears* case, we believe it would be advisable in the present matter to proceed on the supposition that the City has only an easement in the property in question as there can be no doubt that the City has at least that interest therein. We have therefore proceeded along that assumption in this opinion, believing it to be the safest course for the City to pursue in this matter.

We are, therefore, of the opinion that the City can use the property in question for any purpose which does not show an intention to abandon the same and is not inconsistent with the future use of the property for the purpose for which it was condemned. The City can, therefore, rent the property temporarily, but there should be included in the lease a clause

that the City can terminate the same upon notice when needed by the City for the purpose for which it was acquired. This clause would show that the City did not intend to abandon the property and therefore rebut the presumption that it did not intend to use the property in the future.

Likewise the City can temporarily turn property over to the Fire Department or other City Departments, but the order authorizing such use should be so worded as to show the intention of the City to again use the property for the purposes for which it was condemned when it is so needed.

That the City maintains an authorized representative of the Water Department or Sewer Department, as the case may be, on the premises is a fact which shows the intention of the City to use the property for the purposes for which it was acquired, and while this is not absolutely essential it is a very wise course for the City to pursue.

Very truly yours,

DWIGHT MACKAY,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JANUARY 30, 1912.

G. B. YOUNG, Esq., Commissioner of Health.

Dear Sir:

Your communication dated January 22, 1912, transmitting the communication of John H. Chew dated January 9, 1912, hereto attached, in which the latter presents reasons why the Chicago Polyclinic and Henrotin Memorial Hospital should pay one license fee instead of two, has been referred to me for a reply.

Mr. Chew states in his letter addressed to Dr. C. St. Clair Drake in charge of the Division of Hospital Control, that the Chicago Polyclinic and Hospital is an Illinois corporation; that the corporation built and owns the Henrotin Hospital; that the two hospitals are run as one; that the nurses and internes and even patients are changed from one to another and that there is one Board of Trustees for both hospitals, one bank

account and that in every respect both buildings are run as one concern.

The provision requiring a license for a hospital is found in Section 1214, Article 9 of The Chicago Code of 1911, which is as follows:

“License required.) It shall be unlawful for any person, firm, association or corporation other than the regularly constituted authorities of the United States, the State of Illinois, the County of Cook or the City of Chicago to open, conduct, manage or maintain any *hospital as defined in this article* within the corporate limits of the City of Chicago without first obtaining a license therefor as hereinafter provided.”

As you will note in this section, the word “hospital” is restricted to the definition contained “in this article.”

Section 1213 of this article provides as follows:

“Hospital defined.) For the purpose of this article a hospital is hereby defined to mean any *institution or place* used for the reception or care, temporary or continuous, of two or more sick, injured or dependent persons; or used for the treatment of two or more persons suffering from or afflicted with any mental or physical disease or bodily injury, including all hydropathic and massage institutions.”

Assuming that it is true that both buildings are under one management and for that reason might be included in the word “institution” yet we doubt whether both buildings could be included in the word “place.”

Webster defines “place” as “any portion of space regarded as measured off or distinct from all other space, or as appropriated to some definite object or use; * * * Site.”

We understand the buildings are not located in “any portion of space measured off or distinct from all other space or as appropriated to some definite object or use” but, are located according to the statement of Mr. Chew about three blocks apart and are separated by streets.

Under the definition of “place” therefore, we believe that instead of both buildings being a “place” they are two “places.”

We do not believe that the fact that both buildings are

owned by one firm or corporation, is controlling in this matter.

A reading of Section 1219 containing provisions for frontage consents bears out the view we have herein adopted.

We are of the opinion therefore, that the Chicago Polyclinic and the Henrotin Memorial Hospital should be considered as separate "hospitals," and that the City has a right to demand a license fee for each.

Yours respectfully,

MAX M. KORSHAK,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

FEBRUARY 1, 1912.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

The letter of the Washington Shirt Company addressed to you, to which was attached one of the certificates that this company is distributing free, was turned over to me with instructions to advise you as to whether such distribution is contrary to law.

The certificate in question bears a number, and states on its face that, during a certain period of time, such certificates would be distributed free to all persons visiting the stores of this company, and that at the expiration of said period the company would present to a holder of one of the certificates a savings bank account of \$1,000, and to each of five others an account of \$100.00. The certificate does not state that it is necessary to make a purchase or give any consideration whatever in order to obtain same, and the letter of the company states that they are being distributed to all persons applying for same at its stores, whether purchasers or patrons or not, without limitation or restriction.

It is claimed by attorneys representing the company that the advertising value of such certificates does not lie in any inducement it holds out to purchase goods, but in the fact that a person securing same will retain it for reference, thereby

keeping the name and the business of the concern before him. The certificate does not say how the fortunate holders will be selected, but it is admitted that the prizes will be assigned by lot.

A lottery may be defined as any scheme whereby one, on paying money or other valuable thing to another, becomes entitled to recover from him such a return in value, or nothing, as some formula of chance may determine.

Paulk v. Jasper Land Co., 116 Ala. 178.

Nor is the scheme any the less a lottery where the result depends upon the choice or selection of the managers instead of a chance drawing.

State v. Chorts, 32 N. J. L. 398;

Trout v. State, 111 Ind. 499;

Thomas v. People, 59 Ill. 160.

Notwithstanding the above broad definition, which has been generally recognized by the courts, so many ingenious devices have been gotten up in the way of gift enterprises which were clearly gambling schemes that laws simply prohibiting lotteries were found inadequate. As was said in one case:

“All these definitions (of lottery) are too narrow to cover some of the modern devices resorted to in order to evade the lottery laws.” (*Long v. State*, 74 Md. 565.)

Consequently law-making bodies generally have found it necessary to enlarge on this definition, so that at present it would be hard to find a statute or ordinance prohibiting lotteries which does not also enumerate many things besides lotteries likewise prohibited. Yet, while lottery statutes and ordinances have been so broadened in scope, I am unable to find a well-considered opinion, one that may be regarded as an authority, which does not recognize that in order to bring any “lottery scheme,” “gift enterprise,” “scheme of chance,” or any other of this general class of gambling devices within the prohibition defined by law, it must have three essential elements, viz: consideration, prize and chance.

It is true the consideration paid to participate in such chance distribution need not be great. It may be paid in money or other thing of value. It may be simply the result of taking

advantage of an inducement to purchase as distinguished from an extra price paid when a purchase is made. The inducement to purchase, even though the price of the article is not enhanced, is looked upon by the courts as enough to bring such a chance distribution within the meaning of the term "gift enterprise" as defined by statute. But there must be something beyond a free distribution to any one who applies for a chance, in order to bring it within the terms of a law prohibiting such schemes.

Therefore, while our lottery statute is exceedingly broad and comprehensive, it does not prohibit such chance distribution where participation in same does not involve a consideration or an inducement to purchase.

In regard to the ordinances of the city, the portion of same to be construed is Section 985 of the Chicago Code of 1911. This section is headed "Lotteries and Policy Games." It consists of ten paragraphs. Nine of these paragraphs unquestionably refer to and are limited to lotteries and policy games and do not include such a distribution as is contemplated here. The remaining paragraph, the fifth in said section, is the one about which all doubt centers. It reads as follows:

"No person shall sell, offer for sale, vend, barter, exchange, give away, deal in or in any way dispose of or redeem any ticket, order, slip or device of any kind for or representing any number of shares or any interest in any lottery, policy or scheme of chance of any kind or description by whatever name, style or title the same may be denominated or known, and whether located or to be drawn, paid or carried on within or without the limits of the City of Chicago, or whether such purported drawings be real or imaginary."

The two questions involved are, first, whether the words "scheme of chance," as here used, are intended to include such an enterprise as has been pursued in this case, second, whether such a construction of the words would render the paragraph invalid by including something which the law cannot prohibit.

As to the first point, the mere fact that the paragraph is the only one of ten that does not relate strictly to the heading which appears over all, and which must be regarded as

indicating what the section covers, is entitled to great weight in determining the intention of the Council.

Aside from that, in spite of the sweeping general terms used, the rule of *ejusdem generis* undoubtedly applies. This rule is to the effect that where general words follow the enumeration of particular things, the general words will be construed as applicable to the same class of things only.

Thus, in the case of *Moore v. City of Chicago*, 69 Ill. App. 571, it was held that the words "E. O. tables, keno table, faro table, shuffle-board, bagatelle, playing cards, pigeon-hole or any other instrument, device or thing used for gambling, whereon or with which money, liquor or other articles shall be played for," did not include policy slips. Many similar cases could be cited, but the doctrine is so well understood that it would be superfluous to dwell on them.

Applying the above doctrine to this ordinance, we must construe the words "scheme of chance of any kind or description, etc.," to mean such a scheme of chance as has been held, along with gift enterprises and lottery schemes, as an unlawful gambling device.

As to the second point, whether the ordinance would be upheld if construed so as to prohibit such free distribution of tickets, while I do not consider this entirely free from doubt, it would probably be held to be too extreme an exercise of the police power to receive the sanction of the courts.

There are a number of decisions in which the courts have declared that laws prohibiting the giving of premiums with merchandise were unconstitutional.

People v. Gilson, 109 N. Y. 389;

Yellowstone Kit v. State, 88 Ala. 196;

Long v. State, 74 Md. 565.

Under an act "to prevent the sale or exchange of property under the inducement that a gift or prize is to be a part of the transaction," a prosecution against a dealer who gave photographs with packages of tobacco was held improper, the court saying among other things:

"The aim of this statute is to prevent offers of bargains which appeal to the gambling instinct, and induce people to buy what they do not want by the promise of

a gift or prize, the precise nature of which is not known at the moment of making the purchase."

Com. v. Emerson, 165 Mass. 146.

It is true that in this line of cases there is no element of chance whatever, and it may be said that the precise point involved here is not passed upon. At the same time, the most diligent search fails to disclose a case precisely in point.

In the case of *Landsburgh v. District of Columbia*, 11 App. D. C. 512, the court held a trading stamp scheme a "gift enterprise" within the meaning of a statute prohibiting same. This case is the nearest to the question under consideration in respect to the power of the state or municipality to restrict an enterprise of this character which cannot be regarded as a lottery scheme. A careful study of same will show, however, that the decision is based on the point that there is something approaching a misrepresentation or fraud in the scheme rather than on any element of chance in same. Consequently it cannot be cited as an authority to the effect that the plan pursued here is unlawful.

If a party were to say to a few men that he had a cigar to give away and that they could draw lots for same, it is plain that he would not be violating any law. It is hard to conceive how, by doing this on a larger scale, it could be prohibited as a "gift enterprise." As was said in one case:

"It is apparent, however, that the giving away of property without consideration, whether by lot or otherwise, is not in itself an evil, and certainly not such an evil as requires prohibition by law at the present day."

Long v. State, 74 Md. 565.

It is quite possible that many persons, in availing themselves of the right to distribute such certificates to all applicants, will avoid a free distribution. That is to say, they might make it so troublesome for any one who does not buy goods of them to obtain a certificate that they in fact make it a lottery scheme. But of such evasions this department cannot take cognizance in passing on the validity of the free distribution.

Such distribution as is here contemplated, if carried out in the manner stated, is not contrary to law.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

FEBRUARY 2, 1912.

WILLIAM CARROLL, ESQ., City Electrician.

Dear Sir:

Your communication in regard to an electric sign which it is proposed to attach to a building at 851 Belmont avenue, was referred to me for an opinion.

The City Council on January 15, 1912, (C. P. 2498) authorized and directed the City Electrician to issue a permit for the erection of this sign, which it seems is seven (7) feet in its horizontal dimension and twenty-one (21) feet nine (9) inches in its vertical dimension.

You ask whether you can, in view of Section 851 of the Chicago Code of 1911, issue a permit for the erection of same. The difficulty under which you labor seems to have been brought about by the interpretation of the paragraph quoted below in an opinion from this department, dated August 5, 1908, and appearing on page 389 of the printed opinions of 1907-8. I am informed that you have adopted this opinion as fixing the rule to be applied in all applications of this kind. The paragraph to be construed is as follows:

“No illuminated sign shall be permitted to project beyond the curb line. No projecting illuminated sign exceeding six feet in length in its longest dimension shall exceed half its length in width.”

The construction put upon this paragraph in the opinion referred to is, that the word “length” in the ordinance refers to the horizontal or projecting dimension of such signs, and “width” to their vertical dimension. In giving the reasons for such a construction, it is stated that the legislative intent should be followed, and that no construction should be adopted which would lead to an absurdity.

I am unable to agree with the reasoning used in the opinion in question. It might be correct if the words were doubtful or ambiguous or if their plain interpretation would in fact lead to an absurdity. I do not understand that it would lead to an absurdity if the meaning of the words as used were followed, even though it might lead to the use of such large signs that they would be obnoxious and possibly even exceed the limits of safety. It may have been the intent of the Council, in passing the ordinance in question, to have it construed in this way, but the language used does not warrant it.

The rule that is laid down in the interpretation given is subject to the modification that statutes and ordinances must be construed so as to give effect to every word used. If the intention of the Council was as above interpreted, there would have been a much simpler and easier way of expressing such intention, and there need have been no doubt about the meaning of the paragraph. By interpreting it in the manner in which it has been construed, something is read into the paragraph which does not exist there. No reason for the presence of the words "longest dimension" can be assigned if that interpretation is adopted.

I have tried to read these words, in the light of the opinion referred to, as meaning the longest horizontal distance between two points on any sign, but, after considering the matter fully, I have come to the conclusion that such an interpretation would do violence to the language.

The Century Dictionary defines the word dimension as follows:

"Magnitude measured along a diameter; the measure through a body or closed figure along one of its principal axes; length, breadth, or thickness. Thus, a line has one dimension, length; a plane surface two, length and breadth; and a solid three, length, breadth, and thickness. * * *"

I am of the opinion, therefore, that whichever side of a projecting sign is longest, whether vertical or horizontal, the only limitation on its other dimension is that it shall not be more than half as long. This, of course, is subject to the further limitation that it shall not extend beyond the curb.

With this interpretation before you, there can be no doubt as to the propriety of obeying the Council Order.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

FEBRUARY 2, 1912.

HON. JOHN MCWEENEY, General Superintendent of Police.

Dear Sir:

We are in receipt of your communication of the 1st inst., inquiring whether a dramshop license must be taken out by restaurants serving a table d'hote meal including a bottle of Italian wine where the price charged for the meal includes the bottle of wine and is the same whether the guest desires the wine or not.

Section 1525 of the Chicago Code of 1911, in so far as material upon the question raised, is as follows:

"Every place where spirituous, malt, vinous or intoxicating liquor of any kind whatsoever is sold, given away or otherwise disposed of in quantities of less than one gallon, and whether consumed or to be consumed upon the premises or not, and whether sold, given away or disposed of in any grocery store, department store, liquor store, *or other place whatever*, shall be deemed and is hereby defined to be a dramshop, and is hereby required to be licensed in accordance with the provisions of this article; and no person shall keep, conduct or maintain any such place unless he be licensed so to do in accordance with and pursuant to the provisions of this article; * * *"

Assuming that the Italian wine served is, as its name implies, a vinous liquor, that is, a liquor made from the fermented juice of the grape, a restaurant where such wine is sold, given away or otherwise disposed of in quantities of less than one gallon is a dramshop in contemplation of the city ordinances and of the Statutes of this State.

The fact that the same price is charged for the meals whether the guest desires the wine or not, does not affect the question.

We are of the opinion that a restaurant serving wine with meals should be required to take out a dramshop license and that serving wine with meals under the circumstances above described without a dramshop license would be a violation of the liquor ordinances of the City of Chicago.

We return herewith communication of Captain P. D. O'Brien to you dated January 31, 1912 and the complaint therein referred to.

Yours respectfully,

BRYAN Y. CRAIG,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

FEBRUARY 3, 1912.

HON. LAWRENCE E. MCGANN, Commissioner of Public Works.

Dear Sir:

Replying to your inquiry of the 30th ult. with reference to dumping floating material such as manure, garbage, etc., into Lake Michigan at points from which it may float back to the cribs and pollute or obstruct the city's water supply, I am well aware of the fact that the ordinances are rather uncertain on this point, but irrespective of the doubt that may be raised concerning the city's powers and duties in the premises under the law and ordinances I am, nevertheless, of the opinion that:

1. The city has ample power to protect its water supply not only from pollution, but from becoming obstructed in any way.

2. Possessing these powers it is the duty of the city under its police power and the power to prevent nuisances, to stop the dumping of all such matter into Lake Michigan at points where it is bound to float back to the cribs.

3. The ordinances which regulate the dumping outside of the limits of the harbor must be given such reasonable construction as will bring them within the foregoing rules, and if they fail to do so, should be so amended that they will.

In other words *floating filth or other material* which has a tendency to pollute or obstruct the city's water supply

should not be permitted to be dumped into the waters of Lake Michigan at all.

Section 6 of the new harbor act provides that in the construction of harbor improvements "no garbage, ashes or waste shall be dumped into any public waters nearer than four (4) miles from any intake of water for public consumption."

Until the city council by ordinance shall prohibit the carrying through the harbor of such floating matter for dumping beyond the harbor limits, it is my opinion that you should assume and exercise a reasonable discretion in the premises, in order that the danger to pollute or obstruct the water supply may be averted.

Very truly yours,

NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

FEBRUARY 5, 1912.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

In your letter of January 31, 1912, you ask whether it is possible to require persons obtaining permits under the sub-sidewalk space ordinance as amended by the ordinance of January 29, 1912, to keep the sidewalk in front of their premises free from snow and ice.

Not only is this possible, but it is already provided for by the present ordinance, in case your Honor approves the amendatory ordinance above referred to.

You will note that the ordinance of January 29, 1912, does not purport to be an entirely new system of sub-sidewalk space regulation, but is entitled, "An ordinance amending article III of Chapter LXVI of the Chicago Code of 1911, and repealing certain sections of the same." The only sections of that article which are repealed by the ordinance are Nos. 2291, 2301, 2302 and 2309, and the ordinance of October 30, 1911, which amended that chapter.

Among the sections of that article in no way repealed or

changed by the amendatory ordinance, is Section 2305, which reads as follows:

“SIDEWALKS TO BE KEPT CLEAR AND IN REPAIR.) Every person using the space under any sidewalk in this city shall at all times keep said sidewalk in good condition and repair and clear and free from all snow, ice, dirt, filth or other obstructions or incumbrances. All such repairing and cleaning shall be done in accordance with the regulations of the department of public works.”

By the ordinance of January 29, 1912, a bond is provided for in the amended Section 2301. It is provided therein that this bond shall be conditioned, among other things, “for the faithful performance and observance of all the terms and conditions of the said permit and of the various sections of this article.”

As Section 2305 above quoted provides for the person using space under the sidewalk keeping the same free from all snow and ice, the bond which must be given by every person obtaining a permit under the ordinance as amended, must also provide for this.

There can, therefore, be no doubt that under the article as amended by the ordinance of January 29, 1912, persons obtaining permits must, under the terms of the same and of the bonds given by them, agree to keep the sidewalks covered by the permits, free from snow and ice.

The principal question, therefore, is whether such an ordinance is valid. There can be no doubt that the city cannot force property owners to keep their sidewalks clear from snow and ice merely by virtue of its police power. This point has been decided by our Supreme Court in a number of cases, the leading ones of which are:

Gridley v. City of Bloomington, 88 Ill. 554;

City of Chicago v. O'Brien, 111 Ill. 532.

The method by which the property owners are required to keep the sidewalks clear of snow and ice under the terms of article III is, however, by contract. Even in streets where the city has only an easement, it has the right to have those streets kept open for public use and to have them free from any obstruction or change which will make them more dan-

gerous to people using them, and thereby increase the probability of accidents for which the city is liable.

It must be remembered that by the amendatory ordinance of January 29, 1912, a permit is required not only for the use of sub-sidewalk space, but also for putting in coal holes or other openings in the sidewalks. Even if there were any doubt as to the city's right to insist upon a permit for the use of sub-sidewalk space, when the fee to the street is owned by the abutting property owner, although no compensation could be charged for the use thereof, there can be no doubt that the city can require a permit where the sidewalk is disturbed or altered any way so as to increase the danger of accidents thereon. Even in cases where the city has action over against the person creating such an obstruction, the city's primary liability is nevertheless greater than if such an obstruction is not there.

A coal hole or trap door is not absolutely necessary to provide access to the premises of the property owner, as he has perfect access to any space under the sidewalk from his own premises, nor can it be considered a reasonable use without the city's consent, because it increases the danger of accident.

By the ninth and fourteenth paragraphs of Section 1 of Article V of the Cities and Villages Act, the City Council is given power to regulate the use of sidewalks. The legislature may impose reasonable terms and conditions upon the right to use the streets, or may delegate to a municipality the power to do so.

3 Dillon on Mun. Corp., Sec. 1164.

The legislature of Illinois, by the Cities and Villages Act, granted this authority to the City of Chicago, and the City Council can, therefore, place restrictions on its permits to obstruct the streets and sidewalks as it may see fit.

Conditions imposed by the City Council of the City of Chicago are embodied in said Article III as amended. Any person desiring a permit must, therefore, agree to these conditions before receiving one.

The city has heretofore included such provisions in the permits which it has issued for sub-sidewalk space and these

permits have been accepted and signed by the persons receiving them. These persons are, therefore, bound by the terms of the permits, as they constitute contracts. In a somewhat similar matter, that of the provisions included in saloon licenses, that they shall be revocable at the discretion of the mayor, our Supreme Court has held that by accepting them the licensee has agreed to the provisions thereof and is bound by them.

Schwuchow v. City of Chicago, 68 Ill. 444;

Wiggins v. City of Chicago, 68 Ill. 372;

Malkan v. City of Chicago, 217 Ill. 471;

25 Cyc. 626 (C);

Harrison v. People ex rel. O'Hare, 124 Ill. App. 519.

It appears, therefore, that not only does said Article III of Chapter LXVI of the Chicago Code of 1911, as amended, provide for persons obtaining permits keeping the sidewalk clear from snow and ice, but that these provisions are valid and enforceable.

Yours respectfully,

S. CRAWFORD ROSS,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

FEBRUARY 7, 1912.

HON. JOHN E. TRAEGER, Comptroller.

Dear Sir:

Your communication addressed to Honorable William H. Sexton, dated November 9, 1911, wherein you ask advice upon certain questions which have arisen in connection with an audit of the books of the North Western Elevated Railroad Company for the purpose of determining the amount of compensation to be paid to the City under the ordinance of Jan. 8, 1894, has been referred to me for a reply.

By this ordinance the North Western Elevated Railroad Company was permitted to build a main line and branches. This ordinance did not designate the streets over which the main line and branches were to be constructed, except that

the company was permitted to build a main line and four branches within certain boundaries and in certain directions.

The question for this department is the construction of the italicized part of Section 13, of this ordinance, which reads as follows:

“After the expiration of ten years from and after the commencement of the operation of the said elevated railroad *hereby authorized* or some part thereof, said company shall pay into the Treasury of the City of Chicago annually *a percentage of their gross receipts from the operation of said road and branches* as compensation for the benefits conferred by this ordinance upon said company, as follows: One per cent. (1%) for a period of ten (10) years, Two per cent. (2%) for the following period of Ten (10) years and Three per cent. (3%) for the remainder of Fifty (50) years for which this franchise is granted.”

Since the construction by the company of the road authorized under this ordinance, it has enlarged its system so that, at present, it owns and operates various branches and extensions, which it has either purchased or built under authority granted by subsequent ordinances.

The important question is therefore, whether the words “said road and branches” mean the road and branches authorized under this ordinance, or can they be construed to include the road and branches subsequently built and owned by the company at the present time?

For convenience we shall hereafter refer to the lines which the company was authorized to build under the ordinance of January 8, 1894, and the amendments thereto as primary lines and the rest of the present system of the company as secondary lines.

It is well to note at the outset that in none of the ordinances authorizing the construction of secondary lines is there any reference to the provisions for compensation contained in the original ordinance of January 8, 1894.

The intention of the Council controls in the construction of its ordinances. (McQuillan on Municipal Corporations, Sec. 290.) In order, however, to determine the true intention, the particular clauses or phrases should not be studied as detached and isolated expressions, but the whole and every part

of the ordinance must be considered in fixing the meaning of any of its parts.

Black on Interpretation of Contracts, p. 166, says:

"Each clause or provision will be illumined by those which are cognate to it * * * and thus obscurities and ambiguities may often be cleared up by the most direct and natural means."

The same author says (page 37):

"Statutes and contracts should be read and understood according to the natural and most obvious import of the language, without resorting to subtle, and forced construction for the purpose of either limiting or extending their operation."

With these rules of interpretation in mind we shall point out different parts of the ordinance where the words "said road and branches" or similar words, are used for the purpose of getting light as to what the Council intended by the use of this language.

Section 1 of the ordinance of January 8, 1894, gives authority to the company to construct, maintain and operate for 50 years an "elevated railroad and branches * * * upon routes hereinafter named."

Section 1 then states in part:

"The routes *hereby authorized* are as follows:"

Then follow specifications of a route for a "main line of said railroad" and branches. The branches are designated as "First branch," "Second branch," "Third branch" and "Fourth branch."

By Section 2 the company is permitted to cross the main and south branches of the Chicago River with its "*main line and first branch line.*"

Section 3, after providing for the submission to the Commissioner of Public Works and approval by him of plans and specifications of a "standard section of said railroad structure" continues:

"Whereupon the said company may commence to build and erect said *railroad and branches* as herein authorized * * *."

So far it is clear that the "*main line and branches*"

under discussion are those referred to in the ordinance of January 8, 1894.

Section 4 provides that the "company may and is *hereby authorized* to construct, maintain and operate the *said elevated railroad and branches* with one or more tracks * * *."

Thus far only the road and branches authorized by the ordinance are included.

Section 6 provides:

"The permission, authority and privileges hereby granted are upon the express condition that the entire design and plan of *said railroad and branches* shall be that of an elevated structure. * * *"

Section 10 provides in part:

"All other portions of the *main road and branches authorized by this ordinance* must be completed within 5 years."

Section 14 provides:

"Within one year after the acceptance of this ordinance the said company shall file with the commissioner of public works maps and plans showing the exact and definite location selected by it, for its *main road*, and within two years the exact and definite location selected by it for its *branches* which said location shall be subject to the approval of the mayor and commissioner of public works. * * *"

In all the above sections it would seem that whenever the words "road" or "branches" are used they refer only to the road and branches authorized in that particular ordinance and not to "roads" or "branches" to be acquired or constructed in the future.

There is one section (Section 6, Clause 11) however, which the council evidently intended should apply to branches or extensions to be acquired by the company in the future and in this section the language used differs from that in the sections heretofore quoted. This section relates to a five cent fare and clearly provides that the rate of fare shall be in force with respect to "branches" to be acquired in the future.

Clause 11, Sec. 6, provides as follows:

"It is understood that a five (5) cent rate of fare shall be established on the *main line* in conjunction *with the branches of the said railroad*, and no more than five

(5) cents shall be charged and collected per passenger for any one continuous trip within the city limits upon said *main line* or any of said *branches* or upon any *extension* of same, or any connection thereof, operated, managed or controlled by said Northwestern Elevated Railroad Company, its successors, assigns or lessees; provided, however, that police, firemen and mail carriers in uniform may be permitted to ride free of charge."

It seems to us, therefore, from an examination of the entire ordinance that whenever the Council intended provisions of the ordinance to apply to future extensions or branches, clear and unambiguous language was employed for that purpose. With the exception of Clause 11, Section 6 above quoted, the words "said road and branches" or words to that effect, refer and are used as applicable to the primary lines only. The words "said road and branches" contained in Section 13 providing for compensation (which is the one under discussion) are used in the same sense as in other parts of the ordinance (except Clause 11, Section 6, relating to fares *supra*) and we are, therefore, of the opinion that the provisions for compensation contained in Section 13 are limited to "*road and branches*" authorized by the ordinance of January 8, 1894 and not to lines and branches subsequently acquired or built.

This view that unless otherwise specified a compensation provision applies only to the lines originally authorized in the grant providing for the compensation, is supported in the following cases:

State v. M. & I. R. R., 106 Minn. 166;

Union Pacific R. R. v. U. S., 99 U. S. 402;

Pacific Express Co. v. Seebert, 142 U. S. 339;

Minnesota v. St. P. M. & M. R. R., 30 Minn. 311;

State v. McFetridge, 64 Wis. 130;

Illinois Central R. R. v. People ex rel., 119 Ill. 137;

Ill. Cent. R. R. v. Irwin, 72 Ill. 452;

In the matter of Swigert, 119 Ill. 83.

In the following cases the courts held that only such receipts as were earned from the property or business contemplated in the franchise granted were subject to provisions re-

lating either to exemption from taxation or payment of compensation.

State v. Baltimore & Ohio R. R., 48 Md. 49;

State v. Minnesota International Ry., 106 Minn. 176;

State v. Galveston, Harrisburg & San Antonio Ry.,
100 Tex. 153;

R. & G. R. R. v. Commissioners, 87 N. C. 414;

State v. Northern Pac. Ry., 32 Minn. 294;

State v. McFetridge, 64 Wis. 130;

Commonwealth v. Brush Electric Co., 204 Pa. St. 249;

Union Pacific R. R. v. U. S., 99 U. S. 402.

In the case of *Illinois Central R. R. v. Irwin*, *supra* the company was authorized to build a *main line and two branches*. There was a provision for exemption from taxation and the question arose as to whether a certain steamboat owned and operated by the Illinois Central Railroad Company was exempt from taxation.

The court said:

“The taxes then from the payment of which the legislature intended to relieve appellant could have been only the taxes which it, as a railroad corporation would be otherwise liable to pay upon its property acquired in the prosecution of *its business in constructing and operating these lines of road*. None other could have been contemplated, for the plain reason that it was not intended that any other business should be engaged in * * *

We think it clear that the steamboat is not such property as is within the contemplation of the 22nd section of appellant's charter and that the court below properly dissolved the injunction against the taxes levied upon it.”

In a large number of cases where corporations have contended for exemption from taxation by reason of provisions claimed to grant such exemptions in their charters, the courts have laid down the rule that the exemption is limited to the property necessary to the conduct of the authorized business, and that other property, such as elevators, transfer boats, *new lines of road* and the like, are not exempt, because not part of the business authorized by the Charter, containing the exemption provision.

Ill. Central R. R. v. People, 119 Ill. 137;

In the matter of Swigert, 119 Ill. 83;
People v. International Harvester Co., 233 Ill. 223;
Wilmington v. Alsbrook, 146 U. S. 279;
Southwestern R. R. v. Wright, 116 U. S. 231;
L. S. & M. S. R. R. v. B. & O. R. R., 149 Ill. 272;
County of Ramsay v. C. M. & St. P., 33 Minn. 537;
State v B. & O. R. R., 48 Md. 49.

We may state parenthetically that in an interview with the Attorney General of the State, whom we have consulted in respect to the well known Illinois Central Railroad "tax case" (246 Ill. 209), that official confirms our views in regard to the "main line and branches" thereof herein adopted.

We have been unable to find any cases directly in point holding the other view. There are, however, some cases from which some analogy to the question under consideration might be drawn seeming to indicate that subsequently acquired branches are subject to a compensation clause (*M. & C. C. of Baltimore v. Turnpike Co.*, 80 Md. 535; *Mayor and City Council of Baltimore v. U. R. & E. Co.*, 107 Md. 250), but the authority of these cases does not strike us as controlling in view of the preponderance of contrary decision.

We have been unable to find any Illinois cases even remotely bearing out this view.

Assuming that the provisions for compensation apply only to all primary lines the question arises, which *are* the primary lines upon which compensation can be collected?

The following are the present divisions of the lines of the company, and are shown on the plat attached hereto:

- A. Main Line (Shown on plat in green and red).
- B. Loop (Shown on plat in black).
- C. Ravenswood Branch to Western avenue (Shown on plat in brown).
- D. North Water Street Stub Terminal (Shown on plat in purple).
- E. Evanston Branch from Wilson avenue to City Limits (Shown on plat in blue).
- F. Ravenswood Branch west of Western avenue (shown on plat in yellow).

(a) The Main Line. The provisions for the main line

are contained in the ordinance of January 8, 1894, (special ordinances of 1898, page 933). Under the first clause of Section 1, this line was to extend from a point in the now "loop" district generally in a northerly direction to the city limits. Under Section 10 that portion of the main line *south* of Wilson avenue was to be equipped and in operation within three years and that portion *north* of Wilson avenue to the city limits was to be completed within ten years.

Section 10 also contains a provision that if that portion north of Wilson avenue (to the city limits), a distance of $3\frac{1}{2}$ miles, should not be constructed within the ten years, the company should pay as a penalty to the city, the sum of \$25,000 for each uncompleted mile. Under Section 10 of an amendatory ordinance of January 8, 1900, the company was permitted to build $3\frac{1}{2}$ miles westward from a point north of Montrose boulevard on the main line in lieu of the $3\frac{1}{2}$ miles in the prior ordinance mentioned to be constructed in a northerly direction. This portion of the road was not built within the ten year period provided in the ordinance of January 8, 1900, and under Section 10 of the original ordinance the right and privilege to build this $3\frac{1}{2}$ miles westward became void, and by ordinance of January 9, 1900, in addition, the company became liable to pay to the city the sum of \$25,000 for each uncompleted mile, which amounted to \$87,500.

The company, however, did complete that portion of its main line, north as far as Wilson avenue, which became the northern terminus of the main line.

An important amendment was passed on June 24, 1895, (special ordinances of 1898, page 944). Section 1 of the ordinance provides:

"That the route for that portion of the main line of said railroad south of the north line of Institute place in said city shall be as follows: Beginning at a point on the north line of said Institute place between Market street and North Franklin street, thence running in a southerly direction * * * thence continuing southerly *in and along Fifth avenue to the north line of Harrison street in said city.*"

Section 3 of this ordinance provides as follows:

"The provisions of the original ordinance respecting

the annual payment, into the Treasury of the City of Chicago by the said railroad company of a certain percentage of its gross receipts shall be understood to cover and apply to the amendatory ordinance of June 24, 1895 and like percentages as fixed in said original ordinance of January 8, 1894, shall be paid annually into said treasury by said railroad company upon all gross receipts derived by said railroad company, its successors, lessees or assigns from the operation of its railroad as authorized by said amendatory ordinances upon or along said amendatory or additional route. But the word 'successors, lessees or assigns' shall only apply to the company or companies operating the line of railroad of said North Western Elevated Railroad, north of Lake street or south of Lake street in connection with the railroad north thereof."

This last provision was inserted because of the fact that the Company had assigned all of its rights and interests in that part of Fifth avenue between Lake and Van Buren streets to the Union Elevated Railroad Company.

The main line, from the foregoing provision, we conclude consists of that portion of the present system running due north and south with its northern terminus at Wilson avenue and the southern terminus at Van Buren street which includes the route along the west side of the loop. We are of the opinion, therefore, that this portion is included within the "primary lines" and that the city is entitled to 1 per cent. of the gross receipts collected by it on this portion under the provisions of the original ordinance.

(B) Loop. Different companies secured ordinance grants for the construction and maintenance of tracks on different sides of the loop and by means of various assignments the Union Elevated Railroad Company eventually became the owner of all the property and rights of the loop system, (with the possible exception of the Lake street side of the loop) and on September 3, 1901, as appears in a certain deed (document No. 3145009-10) the Union Elevated Railroad Company assigned and conveyed to the North Western Elevated Railroad Company, all of its right, title and interest in and to the present loop.

We are of the opinion that the "loop" not having been

authorized in the original ordinance of January 8, 1894, and the amendments thereto, is not included within the primary lines, with exception heretofore noted, however, that the receipts of the company collected for passage on its lines at stations on the west side of the loop are subject to the compensation provisions of January 8, 1894.

(C) Ravenswood Branch to Western avenue.

This ordinance was passed on January 16, 1905, (Council proceedings at page 2116). There is no reference therein to the original ordinances except that the company is released from a claim in the sum of \$87,500, which became due to the city under the provisions of the ordinances of January, 8, 1900, which was the final amendment of the original ordinance of January 8, 1894. The Ravenswood Branch in our opinion is not included within the primary lines and therefore, under the conclusions heretofore reached, the provisions regarding compensation do not apply.

(D) North Water Street Stub Terminal.

This ordinance was passed July 17, 1908. (Council Proceedings, page 1309.) There is therein a separate and different provision for compensation to the city. We are of the opinion that the Water street terminus is not included within the primary lines, and the ordinance provisions regarding compensation of ordinance of January 8, 1894, do not apply.

(E) Evanston Branch from Wilson avenue to City Limits.

This ordinance is dated July 1, 1907. (Council Proceedings, page 946.) In brief it gives authority to either the company or the Chicago, Milwaukee and St. Paul Railroad Company to electrify the road then owned by the Chicago, Milwaukee and St. Paul Road to the Elevated Company to come down to the street grade, and contains provisions for a five cent fare. In our opinion this extension is not to be included within the primary lines and receipts therefrom are not subject to compensation.

(F) Ravenswood Branch west of Western avenue.

There is no ordinance covering this extension we assume from the following: We have taken this matter up with Mr. Herbert Evans, Secretary of the Committee on Local Trans-

portation, and he informs us that he has not been able to discover any ordinance covering this extension and the City Clerk verifies this, and our own investigation of the printed ordinances fails to disclose any. Our information is that this extension was built upon private property. In any case the Ravenswood Branch is not included within the primary lines, and the receipts therefrom are not subject to compensation under the provisions of the ordinance of January 8, 1894.

Parenthetically we may state that the four branches authorized in the original ordinances were not constructed within the time limits contained in Section 10 of this ordinance by the terms of which section the rights and privileges in consequence lapsed and became void and in fact have not been constructed.

Since the primary lines only are the lines which the original ordinance contemplated as being subject to the provisions for compensation provided therein, the question presents itself whether or not the company should pay compensation on the receipts originating on and collected by secondary lines to the extent that such receipts represent travel on or use of primary lines.

This question received extended consideration in the recent case of *State v. Illinois Central Railroad Co.*, 246 Ill. 188. The Company secured a charter to build a *main* line with two designated *branches* and contained provision for compensation on the gross receipts collected by this *main line* and *branches*. Subsequently a number of branches were added under different grants and the question arose as to whether the state was entitled to compensation on that share of receipts collected on *non-charter* lines which represented travel over the "charter lines."

The court said on page 265 :

"It is further claimed on behalf of the State that appellee has used its charter line property for the benefit of the non-charter line property without charging therefor; that all the engines and cars owned by appellee belonging to and are a part of the charter line equipment; that the depot freight houses and terminal facilities in Chicago and all depots, switch-tracks and sidings at junction points between the charter and non-charter lines are the absolute property of the charter lines; that appellee

has hauled and transported over the charter lines large quantities of coal, iron and other materials and supplies for the sole use and benefit of the non-charter lines without crediting to the charter lines any earnings on account thereof * * * that certain of the non-charter lines have had the use free of charge of all the charter line terminal facilities in the City of Chicago consisting of the passenger depots, freight houses, storage, transfer and clearing yards, round-houses and shops, team tracks switching tracks * * * and have also had the use free of charge of the charter line depots, side-tracks, terminal facilities, and office equipment, at junctions between the charter and non-charter lines outside of Chicago."

The court, after reviewing a large number of authorities, on page 273, says:

"Appellee (the railroad company) must pay the seven per cent. on the total proceeds, including not only the proceeds actually received, but those that should be granted to the charter lines as a fair remuneration for the services they are performing for the non-charter lines in granting the use of their terminals, facilities, cars and engines and other services that the bill alleged had been thus furnished free to said non-charter lines."

To the same effect see *Baltimore Union Passenger Railway Co. v. The Mayor and City Council of Baltimore*.

2 Beach on Cont., Sec. 1105;

Burlington, etc. Ry. Co. v. Dey, 82 Ia. 312;

State v. Baltimore & Ohio R. R., 48 Md. 49.

From the foregoing we conclude, therefore, that the company should pay compensation on the receipts originating on and collected by secondary lines to the extent that such receipts collected by the secondary lines represent travel or use of primary lines.

While we concede that the application of the above may be difficult and in instances, impossible, yet this does not change the law.

In the case of the *State v. Ill. Central*, 246 Ill., the court discusses the *mileage basis* of computation at some length. On page 261 the court says:

"From what has been said it is manifest, under the authorities, that just and reasonable rates are not necessarily based on the cost of service; that terminal expenses

are usually not affected in the slightest degree by distance; that the density of traffic may be an important factor in deciding on the proper rate to be charged, and that a railroad may be more profitably operated with heavy than with light traffic; that the cost of transportation does not vary in proportion to the distance carried; that the cost of construction and operation of railroads widely varies, one railroad being built over mountains and another across a prairie. Rules for the division of joint traffic between the charter and non-charter lines must necessarily be based on experience. They must be formed as a result of knowledge of the actual movement of traffic and be determined thereby. They must take into account the average haul on the charter lines and on the non-charter lines; the comparative cost of doing business on the respective lines, the density of traffic, and all other factors that experience has shown are necessary to be considered in order to reach a fair division of the joint earnings. Justice to the State as well as to appellee requires that all of these different elements making up the cost of transportation should be taken into consideration in dividing such joint earnings, in order to reach a proper basis for fixing the amount on which the percentum is to be paid to the State. It is clear, therefore, that the mileage basis is not the only fair and equitable one for the division of joint earnings. If, however, the State, on the hearing in this proceeding, should prove that certain charges were made for carrying goods partly over the charter lines and partly over the non-charter lines, the court, in the absence of any other proof on that point, would be justified in dividing these joint charges *pro rata*, according to the length of the carriage over the respective lines."

The proper method upon which the computation should be based in order to determine the compensation due to the city is a matter requiring expert knowledge of accounting and it will be necessary to devise some just and equitable basis upon which computation should be made, although, as just stated, the court has held in the *State v. Ill. Central R. R. Co.*, *supra*, that in the absence of any other proof on that point the court would be justified in dividing the joint earnings *pro rata* according to the length of the carriage over the respective lines.

See also *Baltimore, Union Pass. Ry. Co. v. The Mayor and City Council of Baltimore*, 71 Md. 405, where the court said:

“It appears clear that the court thought, that as there was no evidence enabling it or the jury to find how far each passenger who rode on the cars traveled, the only way to approximate a fair basis of settlement was to act on the assumption that each part of each line carries as many as any other part. This seems reasonable, and is the principle the legislature has sanctioned as the mode of ascertaining the taxable gross receipts of steam railroads whose tracks are partly within, partly without the State of Maryland * * *. In *State v. Phil. Wilm. & Balto. R. R. Co.*, 45 Md. 384, this court said that this rule is fair and reasonable. The court also said: ‘It was true that the receipts on one part of the road might be greater than on another, but perfect equality in the assessment or apportionment of taxes is unattainable’ and hence they adopted this rule as right. This court cites *The Delaware Railroad Tax case*, 18 Wall 208, where this rule was approved by the Supreme Court of the U. S. It was also approved in *State Railroad Tax cases*, 92 U. S. 608 and *Western Union Telegraph Co. v. Mass.*, 125 U. S. 530.”

It may be suggested as a practical solution of this difficult feature of determining compensation when traffic originates on a primary line and ends on a secondary line and *vice versa*, that these two classes of traffic may equalize each other. In other words, where traffic originates on a primary line as a consequence of the service of the secondary line in transporting the passengers to their destination the fares paid will equal those fares which originate on the secondary line in consequence of the service of the primary line in completing the transportation. This could be checked up by a count of passengers.

Receipts of Company from sources other than transportation of passengers:

(A) In your communication you state that the Company has been the recipient of certain sums of money from an improvement association for extending the Ravenswood Branch, and you desire to know whether the amount so collected is subject to compensation.

Inasmuch as we have concluded that the Ravenswood Branch is not a “primary line,” the City is not entitled to

compensation on any sums received by the Company on account of the building of this extension.

(B) Answering your query as to whether the city is entitled to a percentum of the receipts of the company collected from advertising privileges, we desire to call your attention to the fact that in an opinion addressed to the Mayor (dated October 9, 1911, Council Proceedings of October 30, 1911, page 1422) this office has held that the carrying of advertisements inside the elevated cars in the City of Chicago, without permission from the city, is unlawful and without authority. In view of this fact therefore and in view of the further fact that it is proposed, as we understand, to pass an ordinance compelling the elevated companies to pay compensation on advertising receipts on the same basis as the surface car companies, we do not believe it advisable at this time to include the receipts of the company from advertising sources, in the "gross" receipts upon which the city is entitled to a percentum under the terms of the original ordinance of January 8, 1894, and amendments thereto. This view has also been held by Edgar B. Tolman in an opinion dated October 7, 1903 (page 501, Opinions of the Corporation Counsel and Assistants, April 5, 1897 to April 14, 1905) addressed to L. E. Gosselin under similar circumstances.

Respectfully submitted,

JOHN W. BECKWITH,

MAX M. KORSHAK,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

FEBRUARY 8, 1912.

HON. A. J. CERMAK, Chairman Sub-Committee on License.

Dear Sir:

Your verbal request for an opinion as to the powers of the city council with reference to the regulation of theaters and the correction of the abuse of "scalping" theater tickets, presents for consideration a construction of Sections 1 and 2 of Article 9 of the Constitution and the following among the enumerated powers of the city council:

41. "to license, tax, regulate, suppress and prohibit hawkers, peddlers, pawnbrokers, keepers of ordinaries, theatricals and other shows and amusements, and to revoke such license at pleasure."

58. "To regulate places of amusements."

66. "To regulate the police of the city * * * and pass and enforce all necessary police ordinances."

91. "To tax, license and regulate * * * brokers."

Section 1 of Article 9 of the Constitution provides that the General Assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, etc., in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates.

Section 2 provides that the foregoing specification shall not deprive the General Assembly of the power to require other subjects or objects to be taxed, consistent with the principles of taxation fixed in the constitution.

This express power to tax occupations for local purposes, has been delegated by the legislature to municipalities in the general law known as the Cities and Villages Act.

In the case of *Launder v. City of Chicago*, 111 Ill. 291, Subdivision 41 of Section 1 of Article V, Cities and Villages Act, involving the validity of an ordinance licensing pawnbrokers, was construed by the court in the following words:

"Under this grant of power it is a matter purely discretionary with the city authorities whether they will license and regulate, or wholly prohibit and suppress business by them within the city. In such case, if the city grants a license, it may impose such conditions and burdens as it may see fit. This latitude of power grows out of the fact that it is discretionary to prohibit the business, or license it on such terms as the city may choose."

In the case of the *People v. Steele*, 231 Ill. 340, the constitutionality of an Act of the legislature "to prohibit the sale of tickets for more than the price printed thereon, for theaters, circuses and places of amusement, etc.," was questioned. It is here said by the court:

"The legislature has the same authority over the theater business as over any other lawful private business, and no more. Besides the requirement of a license it may

interfere with and regulate the business to the extent that the public health, safety, morality, comfort and general welfare require * * *. There is nothing immoral in the sale of theater tickets at an advance over the price at the box office. Such sale is not injurious to the public welfare and does not affect the public health, morals, safety, comfort and good order. * * * The Act prohibits the sale of a ticket by the manager of a theater without the requirement that it shall state on its face that it shall not be resold at an advance, it prohibits the sale of a ticket at an advance and it prohibits the keeping of a place for such sale. If the manager finds it profitable to have tickets on sale at different places, he may not sell at the regular price to brokers who maintain offices at such places and get their expenses and profits out of the advance in price on their re-sale of the tickets. * * * These are arbitrary and unreasonable interferences with the rights of the individuals concerned. The business of the broker in theater tickets is no more immoral or injurious to the public welfare than that of the broker in grain or provisions. * * * The Act in question cannot be justified as a police regulation and was not within the power of the legislature to enact."

In *The Metropolis Theater Company v. Chicago*, 246 Ill. 20, the validity of the city ordinance fixing license fee for entertainments of the first class was questioned. It is here said with reference to Paragraph 41 of the powers of the city council:

"It is apparent that the legislature intended to confer full power on cities and villages to 'license, tax, regulate, suppress and prohibit,' the several enumerated occupations, subject to no other limitations than are imposed by the constitution upon the legislature itself. * * * The power given * * * to tax and regulate theatrical and other exhibitions, shows and amusements, carries with it the power to classify the subjects and to fix a different license fee for each class. * * * Classification of subjects for taxation may not be made arbitrarily; but necessarily there must be great freedom of discretion, even though it result in ill-advised, unequal and oppressive legislation. * * * The classification of theaters made by the ordinance * * * is based upon a difference in the charge of admission. * * *"

The validity of the ordinance was sustained under the taxing power without reference to its reasonableness as a regulatory measure.

In the case of *Banta v. City of Chicago*, 172 Ill. 204, the power of the city to license and tax brokers, was upheld and the ordinance of the city providing for an annual license of \$25.00 was declared a valid exercise of that power.

I have deemed it advisable to furnish to your committee for its guidance the foregoing exposition of the law as expounded by our Supreme Court, in order that you may be enabled to see fairly what may be considered the true constitutional limitations upon the powers of the city council over the subject matter in question.

Basing my opinion upon the foregoing premises I have arrived at the following conclusions:

1. The city council having power to regulate places of amusement and to license, tax, regulate, suppress and prohibit the keepers of theatricals and other exhibitions, shows and amusements; and to revoke such license at pleasure, it may lawfully pass an ordinance to tax and license them according to a new reasonable classification either as to admission fee charged or seating capacity or both. This would produce additional revenue to the city or it might amount to a prohibition for some theaters, without invalidating the ordinance.

Such ordinance might provide for an application for license embodying a restriction against the giving of option contracts for theater seats to brokers. The license issued and accepted upon such application would preclude the licensee in the same manner in which Louder, the pawnbroker, was precluded from objecting to the city's regulations. However, it seems doubtful whether a license based upon such restrictions would be accepted.

2. The city council having power to tax, license and regulate brokers, it may pass an ordinance providing for an annual occupation tax for persons dealing in theater tickets, subject to the constitutional limitation of uniformity. At present the broker's license in Chicago is \$25.00. This would require a new ordinance classifying brokers and taxing them according to such classification. This measure would be rather a doubtful one.

3. Having the power to regulate places of amusement the city council may pass an ordinance which provides additional

safeguards in so far as building, fire, police and health regulations and inspections are concerned.

While it is rather hard to draw the line beyond which the city council may not go, the city's power of taxation properly put in motion, with a view of raising additional revenue, would appear to be the best lever to reach the evil which you seek to eradicate.

Very truly yours,
NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

FEBRUARY 10, 1912.

HON. JOHN E. TRAEGER, City Comptroller.

Dear Sir:

Your favor of the 18th ult. in regard to the right of the City to withhold payment on special assessment vouchers where the contractors to whom the vouchers were issued are indebted to the City, was referred to me for answer.

It is my understanding that you desire an opinion broad enough to cover the question whether the City can withhold payment on special assessment bonds or vouchers issued to a contractor where the City has a claim or demand against the contractor either arising out of special assessments proceedings, or even out of transactions with the City in its corporate capacity and not in any way connected with special assessment matters; and also whether the City can assert this right against an assignee of the contractor as well as against the contractor himself.

In reply I beg to say that I am of the opinion that the exercise of such a right by the City would be in the nature of a set-off or recoupment against the contractor, and that the debt due to the contractor by the City on the bonds or vouchers, and the debt due to the City by the contractor should both be in the same right or capacity of the City. But the Supreme Court has held that special assessment funds constitute trust funds.

Conway v. City of Chicago, 237 Ill. 128, 136.

It has also been held that a municipality is "an instru-

mentality selected by law to receive payment of the assessments from the property owners and to pay the same to the holder of the vouchers."

Village of Wilmette v. People, 214 Ill. 107, 111, 112.

From these cases it would follow that the city acts in a trust capacity in administering special assessment funds, and that therefore, any claims or demands that it may have against a contractor in its general corporate capacity could not be set-off against its debt due to the contractor in its trust capacity on special assessment bonds or vouchers.

In other words the city cannot withhold payment on special assessment bonds or vouchers issued to a contractor because of a debt due to the city by the contractor arising out of some corporate transaction between the city and the contractor having no connection with special assessment matters.

This conclusion is in accordance with the general rule that a trustee cannot set off an independent debt due him individually from the beneficiary against the trust indebtedness.

Knowles v. Goodrich, 60 Ill. App. 506, 10.

25 American & Eng. Encyc. of Law 533 (2d Ed.).

Loring on Trustees, pages 49, 50.

The opinion expressed would also follow as the converse of the rule announced in the case of the *City of Chicago v. Brede*, 218 Ill. 528, where it was held that a municipality could not resort to its general funds to pay special assessment bonds and vouchers. The two funds are separate and distinct, and the Brede case implies that in administering them the city acts in different capacities. If the city, therefore, as trustee, for a special assessment fund cannot draw on the corporate fund to meet a deficit in the special assessment fund, the city cannot set off a claim due it in its corporate capacity against a debt which it owes in its trust capacity.

I am further of the opinion that the city could not set off a debt due it by a contractor arising out of one special assessment proceeding against a debt due by the city to the contractor in another and separate special assessment proceeding. In other words the city could not withhold payments

on special assessment bonds or vouchers issued in one proceeding against a debt due to the city by the contractor arising out of another special assessment proceeding. The reason for this conclusion being that there is no connection or privity between the two proceedings, and that although the city is acting in its trust capacity in both, yet they are separate and distinct matters.

It follows from the views that I have expressed that the city cannot withhold payment on special assessment bonds or vouchers for a debt due it by a contractor, unless such debt arises out of the special assessment proceeding in which the bonds or vouchers were issued.

The same rule that applies to a contractor is also applicable to his assignee, as special assessment bonds are not negotiable (*Trust Co. v. Wilmette*, 220 Ill. 417) and consequently the assignee acquires no different rights than the contractor by the assignment.

I would further suggest that in considering the question proposed in your communication, such policy should be adopted by the city in respect to special assessment bonds, if compatible with the law, which would preserve their character as safe investments and which would not impair their credit or value on the market.

It is well known that these bonds are sold by contractors and are securities which are handled by bond brokers. It would be unwise, therefore, for the city to pursue a course in some particular case which would affect the saleability of all special assessment bonds merely because the exigencies of the case seemed to justify such action. A broader view should be taken of the question.

If the legislation in respect to special assessment bonds and vouchers is examined it will be seen that the dignity of the paper has been increased and its character to some extent broadened. Originally payment to the contractor by the city could be made only by vouchers, which were "made payable to the order of the person or persons entitled thereto." (Laws of Illinois 1887, page 106.) The form of these vouchers was not of such character as to attract a purchaser as an investment. As a rule they were merely endorsed by the con-

tractor and used as collateral by him for obtaining loans. They had no fixed time in which to run, but the city could pay them any time there were sufficient funds collected in the warrant.

In 1893 an amendment to the law was passed authorizing municipalities to issue special assessment bonds payable out of the installments into which the assessments might be divided, bearing interest at the rate of not to exceed 6 per cent. per annum, payable annually. Among other things it was provided that the bonds should be divided into as many series as there were deferred installments, and that one series should become due in one year from date and the second in two years from date, etc. (Laws of 1893.) This gave special assessment paper a standing in the market that it had never possessed previously by putting it in the form and appearance of a bond and making it payable at fixed times. At present these bonds are considered good investments and are sold at excellent prices in the market. All of this inures to the benefit of the property owners assessed in special assessment proceedings. For if the bonds are depreciated in value and the contractor is obliged to sell them at a large discount his bid would of course, be proportionately increased.

It is apparent therefore that if a policy were adopted by the city of withholding payment on these bonds for any and all claims of whatever character against a contractor, the saleability of the bonds as well as their value would be seriously affected.

Respectfully submitted,

FRANK JOHNSTON, JR.,
Assistant Corporation Counsel.

Approved:

PHILLIP J. McKENNA,
Attorney Board Local Improvements.
WM. H. SEXTON,
Corporation Counsel.

FEBRUARY 13, 1912.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

Concerning the liability of street railway companies to pay or contribute to the expense of re-enforcing viaducts or bridges, where such re-enforcement is rendered necessary by reason of the use by the street railway companies of a heavier type of car than those heretofore employed, we beg to advise you as follows:

We first invite attention to the provisions of the street railway companies' right-of-way ordinances which pertain to the subject matter of our inquiry.

A part of Section 1 of each of the ordinances granted to the Chicago City Railway Company and the Chicago Railways Company is as follows:

"That in consideration of the acceptance by the Company of this ordinance, subject to all of the provisions, conditions, requirements and limitations hereof consent, permission and authority are hereby granted to the Company, its lessees, successors and assigns, to construct, reconstruct, maintain and operate a system of street railways in, upon and along the streets and public ways or portions thereof, in the City of Chicago, set out in the schedule marked 'Exhibit A' hereto attached and made a part hereof."

A part of Section 8 of each of the ordinances in question is as follows:

"* * * If it shall hereafter cease to operate over any of its tracks or any portion thereof, it shall remove such unused tracks upon the order of the City Council. Failure to operate cars for the carriage of passengers at least once each way within every hour of each day between the hours of six (6) a. m. and eight (8) p. m. over any part of a street or public place in which tracks of the Company are laid, shall be treated as a cessation of operation of its tracks in such part of street or public place within the meaning of this section, unless such operation is interfered with by unavoidable accidents, labor strikes or litigation brought without connivance of the Company; * * *"

Section 10 of each of the ordinances is in part as follows:

"The Company hereby agrees to comply with all reasonable regulations of the service of the said street

railway system which may be prescribed from time to time by the City Council of said City and that the approval of any such regulation by the Board of Supervising Engineers shall be binding upon the Company (but not upon the City) as to the reasonableness thereof.

STYLE OF CARS.

All passenger cars operated by the Company shall be used for the carriage of passengers only. All such cars hereafter built or purchased shall be of the best and most approved finish, style and design to be approved by the Board of Supervising Engineers; they shall have center aisles; they shall be without running foot-boards along the sides, and shall be equipped with sufficient motor capacity. Cross seats facing forward shall be used, but longitudinal seats, each seating not more than four passengers, may be used at the ends of the cars. All closed cars shall be vestibuled, and shall be of the style and description specified and provided in said 'Exhibit B,' and at least one hundred fifty (150) cars of such description shall be acquired by and placed in operation upon the tracks of the Company within one (1) year from the passage of this ordinance, exclusive of delays occasioned by strikes or other causes beyond the control of the Company."

Section 13 of each of the ordinances in question is in part as follows:

"* * * But nothing in this ordinance contained shall be construed as enlarging or extending any right of said Chicago General Railway Company in or over any of the streets of the City; provided, that the Company shall only be required to operate said through lines across or over any river or canal, when the said City or some third party shall provide and maintain a bridge across the same upon which it may operate its cars."

Section 15 of each of the ordinances in question is in part as follows:

"The Company shall at its own expense fill, grade, pave and keep in repair that portion of the streets occupied by it, as more specifically provided for in said 'Exhibit B.'"

Section 35 of each of the right-of-way ordinances in question provides:

"The enumeration herein of special requirements

and specific regulations shall not be taken or held to imply the relinquishment by the said City of its power to make other requirements or regulations, and the said City hereby expressly reserves the right to make all regulations which may be necessary to secure in the most ample manner the safety, welfare and accommodations of the public, including among other things the right to pass and enforce ordinances to protect the public from danger or inconvenience in the management and operation of street railways throughout the said City and the right to make and enforce all such regulations as shall be reasonably necessary to secure adequate and sufficient street railway accommodations for the people, and insure their comfort and convenience."

Section 40 of each of the ordinances in question provides:

"The Company shall forever indemnify and save harmless the said City against and from all damages, judgments, decrees, costs and expenses which the said City may suffer or which may be recoverable from or obtained against the said City, for or by reason of the granting of the privileges hereby conferred upon the Company, or for or by reason of or growing out of or resulting from the exercise by the Company of the privileges hereby granted, or any of them, or from any act or acts of the Company, its servants or agents, under or by virtue of the provisions of this ordinance."

Exhibit A, of the Chicago Railways Company ordinance contains the provision giving the right to the Company to construct, maintain and operate a double track on, along and across all bridges and viaducts in or crossed by any of the streets or parts of streets included in this Exhibit A.

We are not able to find any similar provision in the Chicago City Railway Company ordinance.

1. It will be noted that Section 1 contains the grant of power or authority and that it gives the right to occupy the streets set out in the schedule marked Exhibit A.

According to the clear intent of Section 1, the purpose of Exhibit A is simply to enumerate the streets which may be occupied, and it is, therefore, questionable if the language employed in paragraph 209 of Exhibit A, which we have heretofore quoted, can be taken to confer upon the company any authority in addition to that conferred by Section 1.

2. As will be noted from the language of Section 8, hereinbefore quoted, failure to operate cars for the carriage of passengers at least once each way between the hours of six a. m. and eight p. m. over any part of a street or public place in which tracks of the Company are laid, shall be treated as a cessation of operation of its tracks in such part of street or public place within the meaning of this section, unless such operation is interfered with by unavoidable accidents, labor strikes or litigation brought without connivance of the Company.

It will be noted that this obligation is absolute save only for the conditions therein enumerated. It, therefore, imposes upon the Company the duty to operate and to do everything essential to make operation possible, otherwise the rights in the street are forfeited.

It, therefore, seems clear that if anything is to be done to create an operating condition which does not already exist, it must be done by the company in order to fulfill its absolute undertaking, and, therefore, if it becomes necessary in order to operate heavy cars, that structural changes be made in the foundation of the roadway over which the cars are operated, whether that roadway be the ordinary streets, a bridge or a viaduct, those structural changes must be made by the company in order to discharge the obligation which is absolute, and in the absence of so doing, thereby entailing a failure to operate, the company, *ipso facto*, loses all right to operate in or along the street in question or any portion thereof.

This conclusion is emphasized by the exceptions contained in Section 8.

It is a well-known canon of construction that the expression of one thing touching a subject matter is an implied exclusion of all other things. So it may well be said that in drafting the ordinance in question the City Council on the one hand, and the street railway company on the other, had in mind that there might be some circumstances under which this obligation to operate hourly cars should be excused, and, therefore, when they expressed the exceptions to the obligation to operate hourly cars, they expressed all exceptions which should at any time or in any way be considered, and that the

provision referred to stands in effect as if there were added thereto words to the effect that under no other circumstances shall the company be excused from operating hourly cars between the hours specified.

3. As hereinbefore noted, Section 10 provides:

“The Company hereby agrees to comply with all reasonable regulations of the service of the said street railway system which may be prescribed from time to time by the City Council of said City and that the approval of any such regulation by the Board of Supervising Engineers shall be binding upon the Company (but not upon the City) as to the reasonableness thereof.

All passenger cars operated by the Company shall be used for the carriage of passengers only. All such cars hereafter built or purchased shall be of the best and most approved finish, style and design to be approved by the Board of Supervising Engineers.”

It is pursuant to this section that the Board of Supervising Engineers have prescribed a car much heavier than that in use before the passage of the ordinance, and it is the use of this heavier car by the company, pursuant to the action of the Board of Supervising Engineers, that necessitates the re-enforcing of bridges.

Of course, the Railway Company might have insisted that there be incorporated in the ordinance a provision that these heavier cars should not be used until such time as the city, or some person or corporation, had provided bridges capable of carrying the load that would be imposed upon them by the operation of these heavy cars. In fact, as we will subsequently note, a somewhat similar provision with reference to a somewhat different subject matter was inserted in each ordinance, and on the theory of the expression of one thing being to the exclusion of all others, it follows that if it were the intention of the parties that the city, or some other person or corporation, were to re-enforce bridges, upon which cars were to be operated, before the heavier type of car should be used by the company, that it would have been expressly so provided in the ordinance.

4. Section 13 provides for through routes at certain points and under certain conditions followed by the proviso:

“that the Company shall only be required to operate

said through lines across or over any river or canal, when the said City or some third party shall provide and maintain a bridge across the same upon which it may operate its cars."

It will be noted from the provision of this section that the drafters of the ordinance in question had in mind the general subject matter of suspending the obligations imposed upon the company until such time as some other person or corporation should furnish to it the facilities for discharging such obligation, and, as heretofore suggested no similar proviso is to be found in the ordinance with reference to the use by the company of the heavy type of car now under consideration.

5. Section 15 provides:

"The Company shall at its own expense fill, grade, pave and keep in repair that portion of the streets occupied by it, as more specifically provided for in said 'Exhibit B.'"

Exhibit B, paragraph 234, provides:

"The Company, as respects filling, grading, paving, keeping in repair, sweeping, sprinkling, keeping clean, or otherwise improving the streets or parts of streets occupied by its railway, shall fill, grade, pave, keep in repair, sweep, sprinkle, and keep clean and free from snow eight (8) feet in width of all streets and public ways, or portions thereof, occupied by it with a single track railway, and sixteen (16) feet in width of all streets and public ways, or portions thereof, occupied by it with a double track railway."

It would seem from this provision that the street railway company is required to construct or pay for any foundation or sub-structure in any highway on which it operates to the extent of eight (8) feet in width for a single track and sixteen (16) feet in width for a double track, and the evident intention and only reasonable construction of the ordinance is that whatever sub-structure is necessary in the highway, be it a filling in of a street proper or a bridging at a point in the highway intersected by a river, the street railway company must pay therefor in the proportion that eight or sixteen feet, as the case may be, bears to the entire width of the street proper on the one hand, or a bridge on the other.

6. Section 35 provides in part:

“The enumeration herein of special requirements and specific regulations shall not be taken or held to imply the relinquishment by the said City of its power to make other requirements or regulations, and the said City hereby expressly reserves the right to make all regulations which may be necessary to secure in the most ample manner the safety, welfare and accommodation of the public, including among other things the right to pass and enforce ordinances to protect the public from danger or inconvenience in the management and operation of street railways throughout the said City and the right to make and enforce all such regulations as shall be reasonably necessary to secure adequate and sufficient street railway accommodations for the people, and insure their comfort and convenience.”

For reasons, which it is not now necessary to consider, the railway company has adopted for operation upon its lines of road, a heavy type of car which, under the terms of the ordinance, it must use to the exclusion of other types.

It, therefore, becomes necessary to propel these cars across the bridges that span the river in streets where the companies' car lines are maintained.

It would not be conducive to the convenience of passengers for the company to operate a heavy car up to the bridge and then require the passengers to leave the car, traverse the bridge in some way and enter another of the heavy type of cars on the opposite side of the river.

If, therefore, the city has the right, under the section last above referred to, to require the company to do things which serve the convenience of its passengers, or if, under the city's police power which is reserved and which it cannot under any circumstances relinquish, it has the right to make regulations tending to promote the public convenience, it would seem to necessarily follow that the city can require the company to do something that will obviate the inconvenience imposed upon a passenger by leaving a car, traversing a bridge and entering another car before proceeding on his journey.

It would seem unnecessary to go into the question of the right of the city to make a requirement of the nature contemplated by virtue of its police power in view of the express terms of the section of the ordinance now under consideration;

but independently of the provisions of the ordinance, the city has, in the exercise of its police power, the right to make provisions having for their object the convenience of the public and to compel obedience to such regulations.

It is held in *Chicago and Northwestern Railway Company v. City*, 140 Ill. 309, and in *Chicago, Burlington & Quincy Railway Company v. People*, 200 U. S. 561, that the police power includes the right to make provisions for the public convenience.

At page 592 of the case last referred to the court says:

“We hold that the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety.”

It may be suggested that, while the city may require the street railway companies to do whatever is necessary to serve the public convenience or provide for the public safety in the operation of these heavy cars, the street car company cannot be compelled to do this at its own expense. But it has been held in cases too numerous to mention that any expense incurred by either a person or corporation in obedience to a legitimate police regulation cannot be made the basis of an objection to such police regulation.

In *Chicago & Northwestern Railway Company v. City*, 140 Ill. 309, the court, in speaking on this subject at page 318 says:

“The items of expense, for which appellant claims compensation, are such only as are involved in its compliance with a police regulation of the statute. It is well settled that ‘neither a natural person nor a corporation can claim damages on account of being compelled to render obedience to a police regulation designed to secure the common welfare.’”

If we are correct in our contention last above made, it follows that the street car companies must operate the heavy type of car across bridges, but it is conceded that the type of bridge now in use has not sufficient strength to carry the type of car now under consideration; that if the type of car now under consideration is to be operated on the bridge now in

use the bridge is liable to break and the passengers on the cars in question will thereby be injured.

The question for consideration then becomes one of the public safety. That the public safety falls within the purview of the police power is to the legal mind axiomatic, and, as we have seen, a person may be required to comply with the police regulations and make whatever expenditure is necessary so to do.

Chicago, Burlington & Quincy Railway Company v. People, 200 U. S. 561, is a case where the convenience and safety of the public required a change in structural conditions to be made by a railroad company. At page 581 of the opinion in that case the court says:

“The concrete case arising upon the petition and the demurrer is this: A public corporation, charged by law with the duty of causing a large body of lands, principally swamp and slough lands, to be drained and made capable of cultivation, has, under direct legislative authority, adopted a reasonable and suitable plan to accomplish that object. That plan requires the enlarging and deepening of the channel of a natural watercourse running through the district, which is the only natural outlet or way of drainage of the lands of the district—the best and only practicable mode by which the lands can be made tillable. But that plan cannot be carried out unless the timbers and stone in the creek—placed there by the railway company when it constructed the foundation for its present bridge—are removed. The timber and stones referred to cannot, however, be removed without destroying the foundations of the present bridge and rendering it necessary (if the railway company continues to operate its road, which we assume it intends to do) to construct another bridge with an opening underneath wide enough to permit a channel sufficient to carry off the water of the system adopted by the commissioners.

The contention of the railway company is that, as its present bridge was lawfully constructed, under its general corporate power to build, construct, operate and maintain a railroad, in the county and township aforesaid, and as the depth and width of the channel under it were sufficient, at the time, to carry off the water of the creek as it then flowed, and now flows—the foundation of the bridge cannot be removed and its use of the bridge disturbed, unless compensation be first made or

secured to it in such amount as will be sufficient to meet the expense of removing the timbers and stones from the creek and of constructing a new bridge of such length and with such opening under it as the plan of the commissioners requires. The company insists that to require it to meet these expenses out of its own funds will be, within the meaning of the Constitution, a taking of its property for public use without compensation, and, therefore, without due process of law, as well as a denial to it of the equal protection of the laws."

And continuing, the court at page 585 says:

"But the railway company, in effect, if not in words, insists that the rights which it asserts in this case are superior and paramount to any that the public has to use the watercourse in question for the purpose of draining the lands in its vicinity, although such watercourse was in existence, for the benefit of the public, long before the railway company constructed its bridge. This contention cannot, however, be sustained, except upon the theory that the acquisition by the railway company of a right of way through the lands in question, and the construction on that right of way of a bridge across Rob Roy Creek at the point in question, carried with it a surrender by the state of its power, by appropriate agencies, to provide for such use of that natural watercourse as might subsequently become necessary or proper for the public interests. If the state could part with such a power, held in trust for the public—which is by no means admitted—it has not done so in any statute either by express words or by necessary implication. When the railway company laid the foundations of its bridge in Rob Roy Creek it did so subject to the rights of the public in the use of that watercourse, and also subject to the possibility that new circumstances and future public necessities might, in the judgment of the state, reasonably require a material change in the methods used in crossing the creek with cars. It may be—and we take it to be true—that the opening under the bridge as originally constructed was sufficient to pass all the water then or now flowing through the creek. But the duty of the company, implied in law, was to maintain an opening under the bridge that would be adequate and effectual for such an increase in the volume of water as might result from lawful, reasonable regulations established by appropriate public authority from time to time for the drainage of lands on either side of the creek."

And continuing further, at page 594 the court says:

"There are, unquestionably, limitations upon the exercise of the police power which cannot, under any circumstances, be ignored. But the clause prohibiting the taking of private property without compensation 'is not intended as a limitation of the exercise of those police powers which are necessary to the tranquility of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments. It has always been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property and though no compensation is given.' Sedgwick's Stat. & Const. Law, 434.

* * * * *

It follows, upon principles of justice, that while the expense attendant upon the removal of the present bridge and culvert and the timbers and stones placed by the company in the creek, as well as the expense of the erection of any new bridge which the company may elect to construct in order to conform to the plan of the Commissioners, should be borne by the railway company, the expense attendant merely upon the removal of soil in order to enlarge, deepen and widen the channel must be borne by the district.

* * * * *

Without further discussion we hold it to be the duty of the railway company, at its own expense, to remove from the creek the present bridge, culvert, timbers and stones placed there by it, and also (unless it abandons or surrenders its right to cross the creek at or in the vicinity of the present crossing) to erect at its own expense and maintain a new bridge for crossing that will conform to the regulations established by the Drainage Commissioners, under the authority of the State; and such a requirement if enforced will not amount to a taking of private property for public use within the meaning of the Constitution, nor to a denial of the equal protection of the laws."

7. Section 40 provides:

"The Company shall forever indemnify and save harmless the said City against and from all damages, judgments, decrees, costs and expenses which the said City may suffer or which may be recoverable from or obtained against the said City, for or by reason of the granting of the privileges hereby conferred upon the

Company, or for or by reason of or growing out of or resulting from the exercise by the Company of the privileges hereby granted, or any of them, or from any act or acts of the Company, its servants or agents, under or by virtue of the provisions of this ordinance."

Thus far, we have proceeded to a point where we should assume that it is necessary that the heavier type of car now under consideration be operated across bridges which must be reconstructed or reinforced sufficiently to provide for the safety of the public riding in such cars, and in considering the section last above referred to we shall regard it as standing alone and by construing it ascertain whether or not the expense of reconstructing or reinforcing the bridges in question shall be borne by the city or by the railway companies.

It is evident that either the city or the company must bear this expense. It must be conceded that if it were not for the company enjoying and exercising the rights conferred upon it by the ordinance in question, that neither the City nor the street railway company would be called upon to incur this expense. It follows, therefore, that the expense is only arising by reason of the granting of the privileges conferred by the ordinance, or by reason of or growing out of or resulting from the exercise by the company of the privileges granted, and the express provision of the section last above referred to is that the company shall forever indemnify and save harmless the city from any such expense.

It would, therefore, seem to be unnecessary to determine whether the duty of strengthening or reinforcing the bridges in question devolved in the first instance upon the railway company or upon the city, because in either instance, under the provisions of the section now under discussion, the city is to be indemnified against any expenditure, so that ultimately whatever expense is necessary must be borne by the street railway company.

A provision of almost identical nature has been before the courts of this state and construed.

In *Chicago, Burlington & Quincy Railroad Company v. City*, 134 Ill. 323, in construing a provision of the nature

contained in the section now under consideration, the court says (page 327) :

“The only question presented for our decision is, can the city, under the provisions of the ordinance of December 20, demand from appellant indemnity against these damages, under the provisions of Section 4 of that ordinance. If it can be successfully maintained that the judgment obtained by Mears against the city was recovered for damages growing out of or resulting from the passage of said ordinance, then, by the express terms of that section, appellant is bound to indemnify the city against such judgment.

If there is any uncertainty in the language of Section 4, it is the result of an effort to make it exceedingly comprehensive and definite, by using more words than were necessary. Its plain meaning, when applied to the facts of this case, is, that the railroad company shall indemnify the city against all legal damages recovered against it by reason of its granting the privileges mentioned in the former sections.”

And continuing, at page 328 the court says:

“It is not necessary that the damages recovered from the city should be the direct and immediate consequence of the granting of that permission, to make the railroad company liable. If they are such as reasonably grow out of or result therefrom, the company is responsible.”

To substantially the same effect is *Chicago, Milwaukee & St. Paul Railway Co. v. City*, 183 Ill. 341.

We are, therefore, impelled to the conclusion that a street railway company may be required to pay the expense of reinforcing a bridge, or the additional expense incurred in constructing a bridge, so that in either instance it may have sufficient strength to bear in safety the additional weight imposed upon it by the operation of the heavy cars under consideration.

Very respectfully yours,

CHAS. M. HAFT,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

FEBRUARY 13, 1912.

HON. GEORGE B. YOUNG, Commissioner of Health.

Dear Sir:

I have carefully examined the ordinance presented with your communication of the 2d instant and herewith return the same with the following commentary.

In addition to adhering to my opinion of December 26, 1911, I desire to call your attention to those provisions of the law which establish and limit the jurisdiction of your department over the subject of milk inspection.

The enumerated powers of the City of Chicago fix the jurisdiction of its officers within and without the city.

Paragraph 79 provides that the city council may prohibit the establishment of cemeteries within one mile of the corporation.

Paragraph 81 confers the power to direct the location and construction of packing houses, etc., within one mile of the city limits.

By Paragraph 83 any offensive or unwholesome business or establishment may be prohibited within one mile of the limits of the corporation.

The city government has jurisdiction upon all waters to the extent of three miles beyond the city limits.

Article X of the Cities and Villages Act, for the purpose of acquiring property for water works, confers jurisdiction for five miles beyond the corporate limits, or so far as such water works may extend.

The Act authorizing cities to construct and maintain water works, extends this jurisdiction for ten miles beyond the corporate limits for the purpose of preventing or punishing pollution or injury to the source of the water supply.

The Act of February 15, 1865, extends the jurisdiction of cities situated on a river within the state for two miles beyond the corporate limits for the purpose of prohibiting the keeping of any boat for the drinking of liquor, gaming or practice of prostitution.

With these exceptions the city's jurisdiction is confined to and must be exercised within the corporate limits.

The ordinance presented by you proceeds upon the opposite theory.

"Inspected Milk" is there defined as milk produced in dairies that have been inspected and approved by the Commissioner of Health.

There can be no doubt raised as to the powers of inspection and regulation possessed by your department in this matter, but they must be exercised nevertheless, within the limits prescribed by the laws of the state.

Section 1 of an Act to fix the standard analysis for milk. (Approved June 7, 1897. In force July 1, 1897) provides:

"That the standard of analysis for milk, in this State as to ingredients and preparation shall be: Water, eighty-eight per cent.; milk solids, twelve per cent., and such milk solids shall contain no less than three per cent. of butter fat." * * * (Section 15, Ch. 147, Rev. Stat.)

Section 19 of Chapter 127 b, prohibits the sale of "skim milk" without a tag with the words "skim milk" printed in large letters on the can, vessel or package.

Section 271 provides the following standard of purity and strength:

"Milk shall contain not less than three per cent. of milk fat and not less than eight and one-half per cent. of solids, not fat."

"Cream shall not contain less than eighteen per cent. of milk fat." (An Act to prevent fraud in the sale of dairy products, etc., approved May 14, 1907, in force July 1, 1907.)

The last General Assembly saw fit to prohibit the tuberculin test for dairy animals.

You will readily see from the foregoing that all those provisions of the proposed ordinance which seek to extend the jurisdiction of your department in the manner indicated, must be held to be invalid and should therefore be eliminated.

Otherwise the ordinance meets with my approval.

Very truly yours,

NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

FEBRUARY 13, 1912.

HON. JOHN MCWEENY, Gen. Supt. of Police.

Dear Sir:

We are in receipt of your communication of the 7th instant requesting an opinion as to whether "the selling without a license of "Mead," which contains less than two per cent. of alcohol, and U. S. "Fizz," which contains one-half per cent. of alcohol, is a violation of the Dram Shop Act governing the sale of liquors."

In the case of *Hewitt v. The People*, 186 Ill. 336, the Supreme Court of Illinois considered certain sections of Chapter 43 of the Revised Statute of Illinois, commonly called the "Dram Shop Act," and drew the following conclusions (341):

"* * * The provisions upon the subject, taken together, amount to this: That the legislature defined a dram shop and selected spirituous, vinous and malt liquors, and branded them as intoxicating without proof of their intoxicating character; that they authorized a license to keep a dram shop and sell intoxicating, malt, vinous, mixed or fermented liquor, and provided that without such license the sale of any intoxicating liquor should constitute an offense and subject the offender to punishment.

Under the statute it is sufficient to prove that a defendant sold spirituous, vinous or malt liquor, without proving their intoxicating quality, but as to other liquors it must be proved, as a question of fact, that they are intoxicating. * * *

Section 1525 of The Chicago Code of 1911 is in part as follows:

"1525. Every place spirituous, malt, vinous or intoxicating liquor of any kind whatsoever is sold, given away or otherwise disposed of in quantities of less than one gallon, and whether consumed or to be consumed upon the premises or not, and whether sold, given away or disposed of in any grocery store, department store, liquor store, or other place whatever, shall be deemed and is hereby defined to be a dram shop and is hereby required to be licensed in accordance with the provisions of this article; and no person shall keep, conduct or maintain any such place unless he be licensed so to do in accordance with and pursuant to the provisions of this article; * * *

It follows from the foregoing that if the "Mead" or U. S. "Fizz" referred to in your communication are either spirituous or vinous or malt liquors, then, without proof of their intoxicating quality, the sale thereof is prohibited within the City of Chicago except by persons having a license to keep a dram shop.

The courts will take judicial notice that certain well known liquors are spirituous, vinous or malt liquors,—for example, that whisky, gin and rum are spirituous liquors and that wine is a vinous liquor and that lager beer is a malt liquor. The courts cannot, however, take judicial notice of the character of Mead or U. S. Fizz, the ingredients and characteristics of which are not matters of common knowledge.

The mere presence of alcohol in the proportions named in your communication would not of itself establish the fact that the liquors mentioned were either spirituous or vinous or malt liquors.

Whether the Mead and U. S. Fizz are either spirituous, or vinous, or malt liquors, is therefore a question of fact to be established by evidence showing what the liquors in question are made of and what their characteristics are and whether they are spirituous, vinous or malt liquors.

If evidence cannot be produced showing that the liquors mentioned are either spirituous, vinous or malt liquors, nevertheless, the sale thereof without a license would be in violation of the liquor ordinances of the City of Chicago, if it can be shown by competent evidence that such liquors are used as a beverage and are in fact intoxicating.

Intoxicating liquors are defined, and the rule in respect to proof of their intoxicating quality stated, in 23 Cyc. at page 57 as follows:

"In the absence of a statutory definition, this term (intoxicating liquors) is understood to include any liquor intended for use as a beverage or capable of being so used which contains such a proportion of alcohol that it will produce intoxication when imbibed in such quantities as it is practically possible for a man to drink. It is therefore permissible to show the proportion of alcohol contained in any liquor in dispute. If this is very great, the courts may hold, without further evidence, that the

liquor is 'intoxicating;' if extremely small they may hold that it is not within the meaning of that term. But otherwise the question must be determined upon testimony as to whether or not the liquor in question can and does actually produce intoxication when taken as a beverage. * * *

We are of the opinion:

(1) That it cannot be said as a matter of law that the sale of the liquor referred to in your communication without a license would be in violation of the liquor ordinances of the City of Chicago; and

(2) That the sale of said liquors without a license would be a violation of the said liquor ordinances if it can be established by evidence, as a matter of fact, either that the liquors in question are spirituous or vinous or malt liquors, or that such liquors are intoxicating.

Yours truly,

BRYAN Y. CRAIG,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

FEBRUARY 15, 1912.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF CHICAGO.

Gentlemen:

On the 29th of January, 1912, your honorable body passed the following order:

"ORDERED, That the Corporation Counsel be and he is hereby directed to prepare and submit to this council at as early date as possible an ordinance licensing and regulating the use of automatic weighing and vending machines."

Pursuant to the city's charter powers, the city council has passed appropriate ordinances:

"To regulate the inspection, weighing and measuring of brick, lumber, firewood, coal, hay, and *any article of merchandise,*"

"To provide for the inspecting and sealing of weights and measures," and

“To keep and use the proper weights and measures by vendors.”

Automatic weighing machines are not excepted from the regulations thus provided, and unless your honorable body wishes to recast these ordinances there is no occasion for action with reference to such automatic devices.

With reference to automatic vending machines I wish to say that the city has power:

“To regulate the sale of meats, poultry, fish, butter, cheese, lard, vegetables, and all other provisions, and to provide for place and manner of selling the same.”

“To regulate the sale of bread in the city or village; prescribe the weight and quality of the loaf.”

“To provide for and regulate the inspection of meats, poultry, fish, butter, cheese, lard, vegetables, cotton, tobacco, flour, meal and other provisions.”

Automatic vending machines, if used for the purpose of selling any of the foregoing provisions, or anything coming within the generic term “provisions,” are merely part of a market or store, the same as a clerk and a cash register, and cannot be specially taxed. The city’s powers with reference to the article that they dispense, are covered by the same regulations that appertain to all other provisions offered for sale to the public.

The foregoing exposition of the law accounts for the failure of this department to prepare the proposed ordinances. Awaiting further action of your honorable body in the premises, we are,

Very respectfully,
NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

FEBRUARY 15, 1912.

HON. JOHN E. TRAEGER, City Comptroller.

Dear Sir:

Some time ago at the request of His Honor, the Mayor, I wrote an opinion concerning the advisability of making a

contract with a newspaper for the publication of the city's advertising in the early editions of such newspaper.

I, at that time, advised strongly against making such a contract, although I did not say that if such early edition was a regular edition and went to the public generally in the same manner as the later editions of the paper, that a publication in same would not be sufficient; in fact, I purposely avoided that particular point, because it involved the question of the validity of former advertising. I simply stated that it would be safer to contract for the entire issue of the paper each day.

It seems as though at that time the contract for advertising had already been agreed upon with the Evening Post. You had sent to this department a request to have the contract drawn up, which was sent back with notice of the above opinion. The matter has again arisen and upon further investigation I find that to have the city's advertising appear in all the editions of one of the great dailies would mean the expenditure of a very large amount of money, approximately forty or fifty thousand dollars more than has been paid heretofore.

I also learned that the practice of advertising in one edition of the daily paper has been pursued for at least sixteen years, and perhaps longer.

While it is true that the mere fact that the expense would be greater, or that it has been done differently heretofore, does not change the law with regard to such publication, nevertheless the question as now presented is whether I am justified in advising you to refuse to execute the contract originally awarded to the Evening Post merely because I regard it safer to pursue the other course.

In order to satisfy myself in regard to the circulation of the early edition of the Evening Post, I made some investigation and have had consultation with Mr. Riley, representing that paper, and his attorney. The latter has called my attention to the case of *Guest v. City of Brooklyn*, 9 Hun. (N. Y.) 198, in which it was held that certain notices were properly published when they appeared in the early edition of a newspaper which had as general a circulation as the later editions.

The case of *Perine v. Lewis*, 128 Cal. 238, was also called to my attention. This case does not involve the same point, but the court in deciding the case seems to lean to the same opinion as in the other case just mentioned.

While neither of these cases cover the point that I made in my opinion to the effect that the early edition of the *Evening Post* has not the general circulation that the later editions have, still they do seem to indicate that a court would hold that if the circulation is general in its nature and not limited to a particular class or classes of people; that is to say, if the paper went out in the same manner as the later editions, the publication would be regarded as sufficient. My own impression is that the true test of determining whether a publication is sufficient would be in case the early edition were the only edition of a newspaper. If in such a case the circulation was general, both in and outside of the city, the publication would probably be regarded as sufficient.

Having this in mind, I called on Mr. Riley to furnish me some idea of the nature of the circulation of the noon edition and he submitted to me a mailing list consisting of a large number of names and addresses, each one of which, he informed me, received a package of papers. I found from same that the paper was delivered to all of the express companies and the different railroad depots in the city, for out of town distribution, also to all the elevated stations, to the Union News Company for sale on the trains; that it was generally sold within the loop district, and that it went to suburban points on the Illinois Central and the Chicago and Northwestern trains. I also see from said list that packages are delivered to car barns at the end of the city street car lines for distribution beyond those points.

In view of the showing made by Mr. Riley, the additional cases cited above and the fact that it would entail so much additional expense to the city, I feel bound to supplement my former opinion to the extent that I withdraw my advice to the effect that the contract had better be awarded to a newspaper which will agree to publish same in all its daily editions, and, therefore, recommend that the contract

as originally awarded to the Chicago Evening Post be entered into.

Yours respectfully,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

Encl.—Letter to Comptroller. Mailing List.

FEBRUARY 19, 1912.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

I return herewith a petition addressed to the Mayor and the City Council by certain owners of property on Blue Island avenue north of 14th place asking the preparation of an ordinance prohibiting the use of any premises in the district above mentioned for a junk shop. I understand that you verbally requested an opinion as to whether such an ordinance would be valid.

City ordinances which are confined in their application to certain districts in a city or town are valid if reasonable. Whether or not an ordinance in the particular case would be held reasonable depends upon the facts and circumstances existing at the time of the passage of the ordinance. Ordinances restricting the operation of dram shops in certain residential districts have been uniformly upheld by the court. In fact in some instances, ordinances which have been of universal application in cities have been held unreasonable because the territory affected was too extensive.

On the facts appearing from the face of this petition it would be my judgment that an ordinance drafted in compliance with the request of the owners would be invalid. I am aware of no facts which would make it reasonable to exclude a junk shop from a particular portion of a particular street while they might be permitted to exist in the rest of the city. An ordinance might be drawn excluding junk shops from certain districts if those districts are of a peculiar and particular character.

In *People v. Busse*, 240 Ill., page 338, it was held that

under the Cities and Villages Act (Clause 95 of Section 1 of Article V) empowering the city "to tax, license and regulate second-hand and junk stores" the city was without authority to prohibit the location of junk stores in certain territory covered by the ordinance involved in that case.

It was also expressly held in that case that a city has no power to provide by ordinance that no junk store, regardless of the manner in which it is conducted, shall be located or maintained without the written consent of a frontage majority of the property owners of the block in which such store is sought to be located and maintained.

It is pointed out by the Supreme Court in this decision that the City Council is without authority to legislate upon the assumption that all junk stores are nuisances, but that the right to prohibit junk stores in certain territory depends upon whether the particular junk store or junk stores legislated against are so conducted as to be in fact a nuisance.

Respectfully submitted,
 MACLAY HOYNE,
Acting Corporation Counsel.

FEBRUARY 19, 1912.

MR. JOHN D. RILEY, Superintendent of Maps.

Dear Sir:

Your favor of the 29th ultimo in regard to the proposed dedication for a street on Ridgeway avenue between Lawrence avenue and Argyle avenue, was duly received.

Since receiving your communication several conferences have been held at which the parties proposing the dedication were present and in which facts were brought out in addition to those contained in your communication.

Your first inquiry is whether a portion of Argyle avenue which it is proposed to dedicate should be eliminated from the plat of dedication because of the fact that it is contained in a condemnation proceeding now pending. In answer I would say that in my opinion the portion referred to should be eliminated from the proposed dedication because it might otherwise furnish an objection to the pending condemnation proceeding.

Your further inquiry as to whether, as Examiner of Subdivisions you have the power to refuse to approve the dedication on the ground that it would not result in a 66 foot street on Ridgeway avenue which would conform with the rest of the street, I would state in reply that in my opinion this is a question which comes peculiarly within your own discretion.

Section 5 of the Cities & Villages Act (Hurd's Revised Statutes 1909, page 358), provides that the city council shall have power to provide, by ordinance, that any map, plat or subdivision of any block, lot or sub-lot or part thereof, or of any piece or parcel of land, shall be submitted to the City Council or Board of Trustees, or to some officer to be designated by such council or board of trustees for their or his approval; and in such cases no such map, plat or subdivision shall be entitled to record in the proper county or have any validity until it shall have been so approved.

Section 2095 of the Code of Chicago (of Art. VIII, Chapter on Public Works) provides that the Superintendent of Maps shall be *ex officio* examiner of subdivisions, and it shall be his duty to examine any map, plat or subdivision of any block, lot, sub-lot or part thereof, or of any piece or parcel of land, situated within the City of Chicago, presented or submitted to him for approval and if he approve of the same he shall so certify.

In passing on the question of the power of a municipality in accepting dedications, in the case of *Littler v. City of Lincoln*, 106 Ill. 353, 368, the Supreme Court said:

"It was never intended by our statutes that owners of property by making plats of additions to cities and villages, could compel the municipal authorities to accept the dedication thereby declared, change municipal boundaries to correspond therewith, and open and work the streets as marked on such plats, for if this might be done, the boundaries of municipalities, and the location, extent and width of streets, would largely depend on the will of the property owners, and not on the judgment of the proper municipal authorities."

Considering this language in connection with the statutory provisions above cited, I think it is clear that the Examiner of Subdivisions possesses the discretion and authority

to determine whether it would be proper and expedient to approve the proposed dedication.

Yours very truly,
FRANK JOHNSTON, JR.,
Assistant Corporation Counsel.

Approved:

PHILIP J. McKENNA,
Atty. Board Local Improvements.
WM. H. SEXTON,
Corporation Counsel.

FEBRUARY 21, 1912.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Replying to your request of February 16th, made through your secretary, for an opinion concerning the validity of Section 2193 of the present code, we beg to advise you that the language of that section is as follows:

"It shall be unlawful for any person or corporation to drive or shunt any passenger or freight cars across any public street or highway at the street grade without an engine attached to such car or cars; every person or corporation violating any of the provisions of this section shall be fined not less than ten dollars and not more than one hundred dollars for each offense."

In considering the validity of this section, the first subject of inquiry naturally is, has the city authority to pass an ordinance of this nature?

Turning, then, to the statute, which is the source of all the city's power, we find that paragraphs 9, 27, 66 and 75 of Article V, Chapter 24, Starr & Curtis' Revised Statutes, are as follows:

"Ninth. To regulate the use of the same (streets)."

"Twenty-seventh. To require railroad companies to keep flagmen at railroad crossings of streets, and provide protection against injury to persons and property in the use of such railroads. To compel such railroads to raise or lower their railroad tracks to conform to any grade which may, at any time, be established by such city, and where such tracks run lengthwise of any such street, alley or highway, to keep their railroad tracks on a level

with the street surface, and so that such tracks may be crossed at any place on such street, alley or highway. To compel and require railroad companies to make and keep open, and to keep in repair, ditches, drains, sewers and culverts along and under their railroad tracks, so that filthy or stagnant pools of water cannot stand on their grounds or right of way, and so that the natural drainage of adjacent property shall not be impeded."

"Sixty-sixth. To regulate the police of the city or village, and pass and enforce all necessary police ordinances."

"Seventy-fifth. To declare what shall be a nuisance and to abate the same; and to impose fines upon parties who may create, continue or suffer nuisances to exist."

Inasmuch as the city's power to pass an ordinance is not dependent upon any single provision of the statute, but may be based upon any combination of powers, we may predicate the city's authority to pass the section in question upon all of the provisions of the statute above referred to.

The evident object of the section under consideration is to keep the streets of the municipality free from dangers that might result in injury to the public.

It is axiomatic that the maintenance of any danger in a street that may result in an injury to the public is a nuisance.

The city's power to pass an ordinance of the general nature of that under consideration is a question that, in our opinion, does not admit of serious doubt.

The remaining question, then, is, does the particular section under consideration fairly tend to accomplish the purposes contemplated by the provisions of the statute, to which we have referred, or any of them?

The shunting of cars in the manner prohibited by the ordinance must necessarily fall under one of three classifications:

1. An act which clearly is not a nuisance or calculated to endanger the public safety.
2. An act which clearly is a nuisance or calculated to endanger the public safety.
3. An act on which the minds of fair-minded men may

differ as to whether it is a nuisance or calculated to endanger the public safety.

We do not believe that it would be seriously contended that the act prohibited falls within the first classification above referred to.

We are inclined to the opinion that the act in question does fall within the second classification above referred to, in which case it would clearly be valid.

If, however, it may be seriously said that the act in question falls within the third classification above referred to, then the determination of the city council that it is in fact a nuisance or calculated to endanger the public safety, is conclusive on the subject and the ordinance is valid.

In speaking on this subject, the court in *North Chicago City Railway Company v. Town of Lake View*, 105 Ill. 207, at page 211 says:

“By the 7th section of the amendatory act of 1867 it is expressly provided ‘the board of trustees shall have the control and supervision of the highways, streets, alleys; public grounds and parks in said town;’ and by the 11th section it is further provided, ‘the board of trustees shall have power to define and declare what shall be deemed nuisances, and to prevent and abate the same, and provide for the punishment of offenders against any order or ordinance passed concerning the same, by fine or imprisonment, or both,’ etc.” * * *

And, continuing, at page 212, the court says:

“We do not at all question the general proposition, which has been argued with so much elaboration by appellant’s counsel, that under a general grant of power over nuisances, like the one in question, town authorities have no power to pass an ordinance declaring a thing a nuisance which in fact is clearly not one. The adoption of such an ordinance would not be a legitimate exercise of the power granted, but on the contrary, would be an abuse of it. But in doubtful cases, where a thing may or may not be a nuisance, depending upon a variety of circumstances requiring judgment and discretion on the part of the town authorities in exercising their legislative functions, under a general delegation of power like the one we are considering, their action, under such circumstances, would be conclusive of the question.

As already conceded, there are many innoxious useful things which the municipal authorities of a town or city could not lawfully, under a general grant of power like the one in question, declare nuisances,—such, for instance, as the exercise of certain trades and callings, as, that of a physician, druggist, and the like. In all such cases as these, courts, acting upon their own experience and knowledge of human affairs, would say, as matter of law, the exercise of these trades or callings, or things of like character, are not nuisances, add that any attempt to so declare them by the municipal authorities would be an unwarranted abuse of their power. On the other hand, there are many things which courts, without proof, will, on the same principle, declare nuisances. Such, for instance, would be the digging of a pit, or the erection of a house, or other obstruction, in a public highway; and an ordinance passed by a town or city having, as in the present case, a general power over the subject, declaring such obstructions nuisances, would be valid on its face, and a conviction might properly be had under it, without any extrinsic proof to show the act complained of was in fact a nuisance. In all such cases it is sufficient to show the existence of the fact constituting the nuisance. And so we regard the use of steam, in the manner specified in the ordinance, for the purpose of propelling street cars along a public street in a thickly populated town, in the absence of any legislative grant authorizing it to be done. Such a use of steam, under the circumstances stated, is, *per se*, a nuisance.”

In view of the statutory provisions to which we have invited your attention, and further, in view of the decision of the Supreme Court of this state, from which we have just quoted, we are of the opinion that the section in question is valid.

Very respectfully yours,

CHAS. M. HAFT,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

FEBRUARY 23, 1912.

HON. JOHN E. TRAEGER, Comptroller.

Dear Sir:

Your communication of the 13th instant with reference to the assignability of city warrants, presents for consideration the following questions:

1. Are city warrants issued to an individual person, for services or otherwise, negotiable or commercial paper?
2. If non-negotiable, may they be assigned?
3. What is the remedy of the assignee of city warrants upon the same, if refused payment?

Chapter 146a of the Revised Statutes provides the manner in which municipal warrants may be issued.

The statute is imperative, that warrants payable on demand may be drawn on the treasurer only when, at the time of the drawing and issuing of such warrants there is sufficient money in the appropriate fund in the treasury to pay them.

Warrants not payable on demand must state on their face that they are drawn in anticipation of taxes already levied.

This statute has been repeatedly upheld by our courts.

County of Cook v. Schaffner, 46 App. 611.

And yet, while the courts have uniformly denied to municipal warrants the qualities of negotiable paper, they have likewise affirmed that they may pass by endorsement or delivery to an assignee.

In the *People ex rel. v. Johnson*, 100 Ill. 537, the court says, on p. 546:

"We regard the rule well settled by considerations of public policy as well as by a decided preponderance of authority, that warrants or orders drawn by one municipal officer upon another, in the disbursements of the funds of the municipality and payment of its indebtedness, are not to be regarded as negotiable or commercial paper, cutting off equities against the corporation."

And on p. 548:

"Nevertheless, in many states, including our own, it has become quite common in business transactions to

transfer these instruments by written endorsements, in the same manner as if commercial paper, and this usage or custom prevails to such an extent that many courts of the highest respectability have recognized the validity of such assignments, for the purpose, simply, of enabling the assignee to sue in his own name, saving to the municipality all equities and defenses which would be available if the suit were brought in the name of the original payee."

"We perceive no substantial objections to this doctrine, and it is believed that public convenience will be promoted by its recognition. Indeed, the principle has already been recognized by previous decisions of this court."

The foregoing practically answers the question presented. Mandamus is an extraordinary remedy and the right to the writ must be absolutely clear.

In the case decided by Judge Windes the question of public policy was raised and upheld against the petitioner.

In that case the fact that over three thousand warrants of individual persons who had assigned them, were involved, very naturally prompted the court to exercise his discretion to refuse the writ. The right to the writ was doubtful, because every warrant issued according to the provisions of the law, was subject to all defenses the city might present. Such questions cannot be determined by mandamus, because to do so would involve the trial of the right of each payee to his warrant.

In addition to this the petition was fatally defective, for the reason that the City Treasurer had not been made a party. Nor was there any allegation that there was sufficient money in the appropriate fund to pay these warrants when they were drawn.

Now, as to assignments of unearned pay by city employes. I cannot condemn this practice too much. It should be stopped, and you are the proper officer of the city to stop it by refusing to recognize assignments made before the proper warrants have been drawn.

This whole matter can be reduced to the following concrete propositions:

1. City warrants when properly drawn according to

statute, are assignable, but subject to all defenses the city has against the original payee. And this is true of all warrants issued by the city, including special assessment paper.

2. Assignments of unearned pay by city employes should not be recognized by your office, before a warrant for earned salary is drawn, but after the pay is earned or the warrant drawn, the payee may assign it and the assignee is entitled to receive the sum named in the warrant.

You are personally responsible if you turn over a city warrant to any person not entitled thereto.

This also answers yours of the 14th instant.

Very truly yours,
NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

FEBRUARY 13, 1912.

JAMES A. QUINN, Esq., Inspector of Oils.

Dear Sir:

Your communication of the 5th instant with reference to the above matter, presents the following questions:

1. The power of the oil inspector under the provisions of Chapter 104 of the Revised Statutes and the ordinances of the City of Chicago.

2. The power of the City of Chicago under paragraph 65 of Section 1, Article V of the Cities and Villages Act, "to regulate and prevent the storage of * * * coal oil, benzine * * * petroleum, or any of the products thereof, etc."

Section 3 of Chapter 104 of the Revised Statutes, provides that—

"Upon the application of any manufacturer, refiner or producer of, or any dealer in, any such oil or fluid, * * * to test any such oil or fluid, said inspector shall test the same * * * by applying the fire test, etc."

Section 4 of the Act provides how packages shall be marked after having been inspected.

Section 7 provides a penalty of not exceeding \$200 for

failure of any manufacturer, etc., to give notice to such inspector of any oil or fluid in his possession not already inspected, or offering to sell the same, etc., or sell or attempt to sell for illuminating purposes oil below the approved standard, etc.

Sections 691 to 694½ of The Chicago Code of 1911 prohibit the construction of buildings intended to be used for the storage of oils or similar fluids unless they have stood the test provided by the State law, and prescribe how existing buildings shall be constructed if they are intended to be used for the storage of oils, etc.

From the law and the ordinances cited, I am of the opinion that the product of no manufacturer, refiner or producer of or dealer in oils, etc., can escape your inspection, if it is intended to be sold, used or stored in the City of Chicago.

If any of the classes named in Chapter 104 refuse or fail to notify you that such oil, etc., which may be in transit for them, or already in their possession, has not yet been inspected in this State, you may institute the proceedings warranted by the Act under which you are appointed.

Under the provisions of the charter the city has the power to prevent the storage of oil, etc., except as provided by the ordinances.

These provisions of the ordinances vest in the proper city officers ample power to prevent the unloading of oil cars and the storage of their contents, unless the product has first been inspected. Kindly avail yourself of the powers thus provided.

Very truly yours,
NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

FEBRUARY 23, 1912.

HON. LAWRENCE E. MCGANN, Commissioner of Public Works.

Dear Sir:

In reply to the letter of February 2, 1912, signed by John Ericson, asking for an opinion as to the contents there-

of, that is, as to whose duty it is to keep in repair buffalo or shut-off boxes, let me say that under Section 2737 of The Chicago Code of 1911, it is the duty of all persons making original application for connection with the water system of the City of Chicago to install, at their own expense, a buffalo or shut-off box, which as this department understands, is used for the purpose of turning on and shutting off water to such premises, such buffalo box to be located to the satisfaction and approval of the Commissioner of Public Works; and no such water connection can be made unless the premises desiring the water are provided with such buffalo or shut-off boxes.

Section 2745 of the Chicago Code of 1911, provides that a person supplied with water, shall, at his own cost and expense, keep in repair all pipes leading from such buffalo or shut-off box to his building and to prevent all waste of water from such pipe. The same section also provides that the cost of installing the service pipe from the water main to the buffalo box shall be borne by the person whose premises are supplied with water through such service pipe, but does not expressly provide who shall keep it in repair after installation.

There is no express provision in either one of the above sections quoted imposing the duty to keep said buffalo or shut-off box or the service pipe from the water main to the buffalo or shut-off box, in repair, after the same are once installed, either upon the city or upon the person whose premises are supplied with water.

And although there is no express binding duty imposed by either one of the said above mentioned ordinances to keep the buffalo or shut-off box in repair, after the same is once installed, either upon the city or upon the owner of the premises, it seems proper and follows, in the estimation of this department, that the important matter of keeping the buffalo or shut-off box in good repair so that the city may exercise its necessary power of shutting off, turning on water and testing the mains, in case of non-payment of water rates, leakage, water main bursts, etc., by necessary implication falls upon the city, and the city by all means should continue

to exercise said control and supervision. However, to avoid ambiguity and probable criticism the present ordinances could be amended so as to expressly confer said duties upon the city.

Respectfully submitted,
J. J. VITERNA,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

FEBRUARY 26, 1912.

HON. HARMAN M. CAMPBELL, President, Civil Service Commission.

Dear Sir:

With reference to the proposed reinstatement of John T. Gohring, tenth grade engineer, city service, referred to in the attached communication from the secretary of the commission, I beg to say that the question involved to be considered in an opinion from this department appears to be from this communication one of the right of the Board of Education to rescind the discharge of Gohring, said discharge being upon charges preferred in January, 1909.

Section 3 of the Civil Service Act, approved March 20, 1895, provides that:

“Said commissioners shall classify all the offices and places of employment in said city, with reference to the examinations hereinafter provided for, except those offices and places mentioned in Section 11 of this Act. The offices and places so classified by the Commission shall constitute the classified civil service act of said city, and no appointments in such offices or places shall be made except under and according to the rules hereinafter mentioned.”

There can be no question under this provision of the statute that Gohring could only be appointed to the city service in the manner provided for by the Civil Service Act, as he does not come within the list of positions mentioned in Section 11 of the act. No question is raised as to the power of the Board of Education through its corporate agencies to dis-

charge Gohring in the first instance, but the right of the board to rescind such action is made the subject for determination.

It appears that Gohring was tried in June, 1909, and discharged from the service of the School Board and the city; that thereafter a new trial was granted Gohring and after a consideration of all the evidence presented at the first trial, together with facts and circumstances in the interim becoming known to the Committee conducting the trial and to the board, the committee found that the finding of the previous committee on the facts and circumstances then presented to that committee was well founded, yet that upon a fuller consideration of the case with the conditions and facts which it developed since the first trial, the said Gohring had been indiscreet in his remarks and criticism of the educational management of the School Board and that for such dereliction he should be fined the amount of his salary from the date of his first suspension up to that time (February 7, 1912), but that he should be reinstated under the terms of the report from the day the first vacancy in an engineer's position should occur in the same group, class and grade as of the date of his first suspension, subject, however, to such revisions as had been made.

Unless there be some statute or rule to the contrary, a trial committee or board, acting as it does in the performance of a *quasi* judicial function undoubtedly has the power to re-examine its findings and the evidence upon which such findings were based, to hear and pass upon new and additional evidentiary facts occurring since the date of the first hearing and to rescind, change, annul or modify its previous action if it finds that the facts and circumstances of the case so warrant.

To hold that such a board is concluded by its original finding from ever reopening the proceedings would be to place a restriction upon such a board which the legislature has not even seen fit to impose upon our highest courts. True it is, that in the case of applications for new trials or rehearings in the courts, the legislature or the rules of those courts have placed limitations upon the time within which such applications must be made.

In the case of the Board of Education there is no rule called to my attention and I think that there is none in fact, which prohibits the board or its trial committee from reopening the case of a discharged employe within a reasonable time. Just what length of time is to be considered reasonable must be governed by the facts in each particular case and there is nothing in the record before me showing that the modification of the first finding discharging Gohring was delayed unreasonably. The committee modified the original sentence of discharge against Gohring and substituted therefor a fine consisting of the loss of his salary from the date of the original discharge to the time of reinstatement.

Concerning the severity or leniency of this altered imposition of penalty this opinion can, of course, take no notice.

It is evident from the report of the findings of the last committee that it considered the original discharge too severe a punishment in view of the later evidence heard by it.

The power to discharge school employes is vested in the Board of Education. *People v. Brenan*, 176 Ill. 620, 632. It is there said:

“Giving effect to the provision of the Pension Act as the latest expression of the legislative will, we are of the opinion that the Circuit Court was right in holding that the Board of Education has the power to investigate and determine charges against its employes and to remove or discharge them, but that in all other respects the Civil Service Act applies to such employes according to its terms.”

It being established that the Board of Education possesses the power of discharge of employes, I am of the opinion that the modification of the order discharging Gohring made by a subsequent trial board is legal and effective.

Yours respectfully,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

FEBRUARY 26, 1912.

HON. LAWRENCE E. MCGANN, Commissioner of Public Works.

Dear Sir:

On the 31st of January, 1912, you directed to this department the following general inquiry:

Does a water pipe extension certificate begin to bear interest two years after it has been issued, or two years after a proper survey shows a permanent annual revenue of ten cents per lineal foot from the water pipe laid?

Basing our reasoning upon the circumstances surrounding the laying of water pipes by special deposit, as well as upon the provisions of the Code of 1911, which substantially reenact the pertinent provisions of the Tolman Code of 1905, we arrived at the conclusion that the interest bearing period began two years after the survey showed the requisite permanent annual earnings of ten cents per lineal foot.

In your communication of the 19th instant you inquire from what date the interest shall be computed on the certificate of deposit issued to J. L. Cochran.

This certificate was issued in accordance with the provisions of the Code of 1897, which are identical with those of the Codes of 1905 and 1911, with the exception of the rate of interest to be paid, which then was five per cent.

Section 5 of the Act of April 15, 1873, authorizing cities, etc., to construct and maintain water works, provides:

"The expense of locating, erecting, etc., and laying water mains, pipes * * * may be assessed and collected from the property of real estate benefited thereby * * * in such manner as may be provided for the making of special assessments for other public improvements." * * *

The constitutionality of this provision was upheld by the Supreme Court in the case of *People ex rel., etc., v. Sherman et al.*, 83 Ill. 165.

The same act vests the power of management and control of water works in the city council.

Pursuant to this Act and Article X of the Charter, the City Council has passed appropriate ordinances.

Section 1669 of the Code of 1897 contains the same provision with reference to laying of water mains by deposit, by

property owners, with the exception of allowing interest upon the certificates of deposit at the rate of five per cent. Repayment is predicated upon a survey showing a permanent annual revenue of ten cents per lineal foot.

Section 1671 provides that no water main shall be laid or extended by the Commissioner of Public Works, unless upon an order of the City Council directing the same * * *.

“Provided, however, that nothing in this article contained shall be construed to apply to the laying or extension of water mains where provision shall have been made for the same by special assessment, or *where the cost of the same shall be paid by private individuals who shall by agreement wait for reimbursement until a permanent annual revenue shall have been derived thereupon; as herein provided.* * * *”

Section 1672 provides for repayment in the case the laying of water mains was done by special assessment.

“Provided, however, that no such money shall be repaid unless the permanent annual water rates derived by reason of the laying of said water main * * * shall at the time of such repayment, per annum equal at least ten cents per lineal foot. * * *.”

Section 1906 of the Code of 1905 re-enacts Section 1669 of the Code of 1897, with the exception that it reduces the rate of interest to be paid to three and one-half per cent.

Sections 1908 and 1909 re-enact Sections 1671 and 1672 of the Code of 1897.

Section 1910 provides:

“For the purpose of providing a more equitable method wherewith to pay and discharge the water special assessment refunds and water pipe extension certificates heretofore issued by the city and now outstanding, the Mayor and city clerk are hereby authorized and empowered to issue certificates payable out of the water fund, to an amount sufficient to retire all such certificates and refunds now outstanding. Provided, however, that no such water pipe extension certificate shall be taken up unless the pipe for the laying of which such certificate was issued *is paying the revenue required by such certificate*, and no such special assessment refund shall be taken up unless the pipe for the laying of which such special assessment was levied and paid is paying

a permanent *annual net revenue of at least ten cents per lineal foot* of such pipe."

Section 1911 provides that such certificates shall bear interest at the rate of three and one-half per cent. per annum, from the date of their issue, payable annually and shall mature thirteen years after the date of the certificate it cancels, etc. And then follows the form of such certificate.

Sections 2128, 2130, 2131, 2132 and 2133 in substance re-enact the like provisions of the Code of 1905.

Section 2128 provides in part:

"And whenever, upon a proper survey, it is shown that a permanent annual revenue of ten cents per lineal foot, is being derived from such water mains so laid, then such money so advanced as aforesaid shall be repaid to the person or persons so advancing the same; provided, however, if the money so advanced is not paid back within two years, interest at the rate of three and one-half per cent. per annum shall be allowed after the expiration of said two years, until paid."

The circumstances under which the city undertakes the laying of water mains on special deposit are in every case such as to bring its action in this regard within the denomination of the word "accommodation" to the person or persons benefited. The city is not bound to extend its mains into new subdivisions on such deposits, but it may have the work done by special assessment. In both cases it may be years before a sufficient number of houses have been erected to make the undertaking a paying venture on the part of the city.

The successive ordinances passed by the city council are in the nature of remedial legislation. More equitable treatment of the depositor is sought to be attained, provided that he sees fit to avail himself of the provisions.

In the present case the depositor has failed to do so for the very reason apparently that his certificate bears interest at the rate of five per cent. if the money is not repaid two years after the date of its issue.

This provision for interest in the certificate is null and void, unless clearly warranted by the ordinances in force when it was issued. In this connection it should be borne in

mind that the principal is not repayable until the permanent annual revenue has been attained.

Another section refers to *reimbursement* after such permanent annual revenue has been shown.

In other words, the city agrees with the depositor that if the money he has advanced is not repaid within two years after such permanent annual revenue has been shown, it shall thereafter bear interest at the rate of five or three and one-half per cent., as the case may be, *until paid*.

I am therefore of the opinion that a proper construction of the law and ordinances in question, warrants the presumption that it was the intention of the City Council that a survey should first establish the fact that a permanent annual revenue of ten cents per lineal foot has been earned, before interest shall be paid. Also, that the certificate should begin to draw interest two years from the time that this permanent annual revenue has been earned, if the money remains unpaid.

The survey made must be based upon the water rates in force when the certificate was issued.

The survey in the Cochran case, if properly made, should fix the time when the water mains laid began to earn a permanent annual revenue of ten cents per lineal foot. If the city has failed to pay Cochran within two years after the time thus fixed by the survey, he is entitled to interest at the rate of five per cent. per annum thereafter, until paid.

The provision in the certificate for payment of interest beginning two years after its issue, is invalid and does not bind the city.

Very truly yours,

NICHOLAS MICHELS,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

FEBRUARY 28, 1912.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

Replying to your communication of February 21st relative to liability of Baltimore & Ohio and Illinois Central

Railroad Companies to maintain a pedestrian viaduct over their tracks at 88th street, we beg to advise you that, while the ordinance attached to your communication is silent on the subject of maintenance, the well established rule of law is that as a general proposition the duty to construct a viaduct carries with it the duty to maintain it.

In view of the general current of authority, the subject under discussion would not admit of any appreciable doubt if it were not for the recent opinion of the Supreme Court of this state in *Chicago v. P. Ft. W. & C. Ry. Co.*, 247 Ill. 319. In that case the court at page 322 says:

“It is insisted by the city that all of Eighteenth street from Canal street to the viaduct proper over the railways, including pavement, man-holes, catch-basins, curbing and sidewalks, is a part of the approach to said viaduct, and therefore a part of the viaduct, and for that reason the city can compel appellant to keep and maintain all of said approach in such condition of repair as the convenience of the public or the safety of lives and property may require; that notwithstanding the ordinance under which the viaduct was constructed provided that the city should maintain and repair these approaches, the city authorities by said ordinance could not waive the authority of the city, under its police power, to require appellant to maintain and repair said viaduct, including its approaches. The conclusion that we have reached in this matter renders it unnecessary for us to consider that question. There can be no doubt that under the provisions of the ordinance granting the appellant the right to construct its railway in the City of Chicago, as well as under the statutes of the state concerning the control of railways, the public authorities can compel appellant to construct and maintain proper crossings at streets, alleys and highways, or, if the safety and security of the public require, to erect and maintain viaducts with proper approaches thereto.”

And continuing, the court at page 323 says:

“Ordinarily an ‘approach’ as that term is used, is considered a part of the viaduct. What would be regarded as approaches would depend largely upon the demands of the traveling public and ‘upon what would be reasonable under the circumstances and local situation in each case. It is manifest that they do not and should not, in all cases, include all that part of the right

of way that is covered by the street or highway and is not immediately at the crossing.' (*City of Bloomington v. Illinois Central Railroad Co.*, 154 Ill. 539.) What is a viaduct proper and what is an approach, where one begins and the other ends, and what is a street or highway as distinguished from the approach, are more questions of fact than of law and are sometimes not easy to decide."

And continuing further, the court at page 324 says:

"The railroad must keep and maintain its crossings so that they will continue to meet the needs and requirements of an increasing population in respect to the safety of persons and property (*Northern Pacific Railway Co. v. Duluth*, 208 U. S. 583); but this does not necessarily require the railroad to keep and maintain that which is for every practical purpose a street or highway, even though incidentally it is used as a part of the ascent or approach to reach the viaduct. The railroad company in *State v. St. Paul, Minneapolis and Manitoba Railway Co.*, 98 Minn. 380, was compelled, under the police power of the state, to erect and maintain a viaduct and long approaches over its railroad. But the same court held in *State v. Northern Pacific Railway Co.*, 99 Minn. 280, that there were reasonable limitations upon the liability of the railway company to maintain and repair the so-called viaduct approaches; that where a part of these approaches was filled in permanently the full width of the street, resulting in a mere raising of the street grade, such permanently filled portions of the improvement constituted no part of the viaduct or 'approaches,' and that the curbing, paving and sidewalk upon those portions could not be charged to the railroad company."

And in conclusion, the court at page 326 says:

"On the facts in this record the City of Chicago was without authority to pass or enforce the ordinance in question requiring appellant to repave and keep in repair West Eighteenth street from Canal to Mechanic street. The judgment of the Municipal Court must therefore be reversed."

It will thus be seen that it is the intention of the Supreme Court of this state to avoid the establishment of any rule which can be regarded as of general application, but that every individual case must be considered on its own merits.

We are of the opinion that under the facts involved in the pedestrian viaduct at 88th street, it is the duty of the railroad companies to maintain it.

Very respectfully,

CHAS. M. HAFT,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

FEBRUARY 29, 1912.

MR. H. M. PIERCE, 657 First National Bank Building, Chicago.

Dear Sir:

Your letter to William H. Sexton, Corporation Counsel, of February 5, 1912, has been assigned to me for a reply, in which you say there is a case pending in the Municipal Court of the City of Chicago before the Honorable Hosea W. Wells, wherein the validity of Section 865 of the Chicago Code of 1911 is called in question by the judge, who is inclined to hold that the said section deprives the owner of estray animals of his property without due process of law. The ordinance is known as the Estray Ordinance.

Said ordinance declares certain animals found running at large on any street, public alley or place within the city to be estrays and such estrays to be a nuisance. It provides for the impounding of the animals; provides that the General Superintendent of Police shall receive reports of said estrays and shall keep a record of the same, and if said estrays are not redeemed by the third day, it provides for the sale; it provides for notice of a sale; it provides for a hearing; it also provides that the amount of money over and above the expenses incurred by reason of such impounding shall be deposited with the comptroller of the city and kept there for a certain length of time to be paid to the rightful owner.

The City Council derives its authority for the enactment of said ordinance from the State Legislature in the following provisions of the Cities and Villages Act. Paragraph 80, Chapter 24, of said act reads as follows:

“The City Council shall have the power to regulate,

restrain and prohibit the running at large of horses, cattle, swine, sheep, goats, geese and dogs, and to impose a tax on dogs."

Paragraph 75 of the same act provides that "the City Council shall have power to declare what shall be a nuisance and to abate the same, and to impose fines on parties who may create, continue or suffer nuisances to exist."

While the courts have held that all things that a municipality may declare to be nuisances are not nuisances, if, in fact, the evidence shows them not to be, it will hardly be necessary to quote any authority to show that animals running at large in a great metropolitan city, are nuisances. To what extent then may the city proceed to abate the same?

In *King v. Davenport*, 98 Ill. 305, in considering the question as to what extent a municipality may go in dealing with a nuisance, the court uses the following language:

"In the exercise of the police power, the Legislature may not only provide that certain kinds of property may be seized and confiscated upon legal process after notice and hearing, but may also, when necessary to insure the public safety, authorize them to be summarily destroyed by municipal authorities without a previous notice to the owner, as in familiar cases of pulling down buildings to prevent the spreading of a conflagration or the impending falling of the buildings themselves, throwing overboard decayed or infected food, or abating other nuisances dangerous to health."

This doctrine is quoted with approval in *Sings v. City of Joliet*, 237 Ill. 310.

We understood the thing that most concerned the court in the case referred to was that the said ordinance deprived a man of his property without due process of law, the court evidently having in mind that it required a judicial proceeding in order to take a man's property by due process of law. In this, the court is evidently mistaken, for it does not require a judicial proceeding before a court to deprive a man of his property, to avoid coming in conflict with the constitutional provisions in regard to due process, etc., nor is it essential to have a jury trial.

McGehee on Due Process of Law, p. 52, says:

"But neither proceedings according to common law,

nor judicial proceedings in a formal court for the trial of actions, are essential to due process."

In the case of *Reetz v. Michigan*, 188 U. S. 507, the court says:

"We know of no provision in the Federal Constitution which forbids a state from granting to a tribunal whether called a court or a board of registration, the final determination of a legal question, indeed, it infrequently happens that the full discharge of their duties compels board or officers of a purely ministerial character to consider and determine questions of a legal nature. 'Due process' is not necessarily judicial process."

Again, the United States Supreme Court says in *Mugler v. Kansas*, 123 U. S. 672, that due process, etc., does not require a jury trial. The court uses the following language:

"The jurisdiction of courts of equity to abate nuisances is of ancient origin, and such an abatement satisfies the constitutional requirements."

This has been so held by our own Supreme Court time and again in construing our state constitution. It is due process of law for the City of Chicago to do what it has done in this ordinance, namely, provide for notice of a sale, a hearing and for the payment of the residue of such sale to the rightful owner.

In conclusion I am of the opinion that the ordinance in question is valid and does not conflict with any constitutional provision, either state or federal.

Respectfully submitted,

A. L. GETTYS,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

MARCH 2, 1912.

HON. JOHN E. TRAEGER, City Comptroller.

Dear Sir:

I have your letter of the first instant stating that you are in receipt of a voucher from the Board of Election Commissioners in favor of the Empire Voting Machine Company for \$93,307.50 in payment of 99 Empire voting machines,

and that on January 29, 1912, the city council passed an ordinance amending the Annual Appropriation Bill as follows:

“25 S 3, for the payment of the purchase price of
200 voting machines at \$942.50.....\$188,500.”

You further state that some question having arisen as to the legality of amendments to the appropriation bill being passed subsequent to the passage of the bill as a whole, you desire an opinion from me on this subject before passing said voucher to payment.

While there is no decision of our reviewing courts on the specific question, in my opinion, it is easily answered.

Section 2 of Article 7 of the Cities and Villages Act provides that the city council shall

“within the first quarter of each fiscal year, pass an ordinance, to be termed the Annual Appropriation Bill
* * * No further appropriation shall be made at any other time within such fiscal year, unless the proposition to make such appropriation has been first sanctioned by a majority of the legal voters of such city * * *.”

In my opinion a fair, reasonable construction of said section is that the city council within the first three months of the fiscal year must pass the appropriation ordinance and may amend such ordinance, *provided* the amendment thereto is made within said period. In my opinion, any other construction would be a forced construction and one wholly unnecessary as no reason can be advanced for confining the power of the city council to the passage of an ordinance without the power to amend the same. Nothing is to be gained by so doing and many reasons can be advanced for a more liberal and sensible construction of the statute.

I am, therefore, of the opinion that said amendment having been passed within the first quarter of the fiscal year, it is a legal appropriation.

I return herewith said voucher.

Yours very truly,

WM. H. SEXTON,
Corporation Counsel.

MARCH 6, 1912.

HON. ANTON J. CERMAK, Chairman, Sub-Committee of the
Committee on Gas, Oil, and Electric Light.

Dear Sir:

We are in receipt of your communication of February 24th in respect to the Illinois Tunnel Company, requesting an opinion of this department on the following questions:

"1st. Is it necessary for the city to prove that the said company did not have telephones serving 20,000 *bona fide* subscribers on June 1st, 1911, or, can the city force the Illinois Tunnel Company to prove that they had the requisite number of phones? In other words, is the burden of proof on the city or the Tunnel Company?"

2d. If the city should determine that the said company did not have telephones serving 20,000 *bona fide* subscribers on June 1st, 1911, could the city at this time cause a forfeiture, as provided in the ordinance of said company, or have we lost that right by virtue of our delay in the matter, said company having installed a considerable number of phones subsequent to June 1st, 1911?"

The Illinois Tunnel Company is in the hands of Charles G. Dawes and David R. Forgan, receivers of said company, appointed by the District Court of the United States in and for the Northern District of Illinois, Eastern Division, in the consolidated cause of the *Corporation Trust Company v. Illinois Tunnel Company*, number 29760, and *Central Trust Company of Illinois, Trustee, v. Corporation Trust Company, Illinois Tunnel Company and Charles G. Dawes and David R. Forgan, Receivers of Illinois Tunnel Company*, number 29915.

Said Illinois Tunnel Company, or its receivers, are operating its telephone system in the City of Chicago under an ordinance granted by the City Council of the City of Chicago to its predecessor, the Illinois Telephone and Telegraph Company, on February 20, 1899 (C. P., pp. 1692-1696), and ordinances amendatory thereof passed by the City Council July 15, 1903 (C. P., 915-921), July 20, 1903 (C. P., 928, 929), February 1, 1909 (C. P., 2602-2604), and June 28, 1909 (C. P., 911-914).

The ordinance of June 28, 1909, contains the following provision:

“If said company, its successors and assigns, shall fail to construct or shall cease to operate fifty (50) miles of such tunnels within ten years from the time this ordinance goes into effect, then and in that case said company, its successors and assigns, shall also forfeit to the city all rights acquired under this ordinance, together with its plant and equipment, for transportation purposes then installed; and if said company, its successors and assigns, shall fail to construct, equip and install a telephone system under the terms of said ordinance to said company of February 20, 1899, adequate for the services of 20,000 subscribers prior to June 1st, 1911, or if at any time after said June 1st, 1911, said company, its successors and assigns, shall not have in operation or shall cease to operate a telephone system serving 20,000 *bona fide* subscribers, then and in each such case said company, its successors and assigns, shall also forfeit to the city, or to any licensee or grantee of the city (designated or authorized by the city for this purpose), all rights acquired under said ordinance of February 20, 1899, together with its plant and equipment for telephone purposes, and shall forthwith turn over the ownership and possession of said plant and equipment to the city, or to any licensee or grantee of the city (designated or authorized by the city for this purpose) *
* *”

If the Illinois Tunnel Company, as assignee of the Illinois Telephone and Telegraph Company, on June 2, 1911, and continuously thereafter, did not have in operation a telephone system serving 20,000 *bona fide* subscribers, this would under the terms of the ordinance of June 28, 1909, which was accepted by the company and constituted the contract of the parties, afford ground for a forfeiture to the city of “all rights acquired by the company under said ordinance of February 20, 1899, together with its plant and equipment for telephone purposes.” This is on the assumption that the company was not delayed by acts of the City of Chicago from putting into operation by June 1, 1911, a telephone system serving 20,000 *bona fide* subscribers.

Belleville v. Citizens Horse Ry. Co., 152 Ill. 171.

Blocki v. People, 220 Ill. 444.

Chicago City Ry. Co. v. People, 73 Ill. 541.

Wheeling & E. G. R. R. Co. v. Triadelphia, 4 L. R. A. (N. S.) 321.

City of Tower v. Tower & S. St. Ry. Co., 68 Minn. 500.

The City could doubtless waive the performance of the condition in the ordinance in respect to the time when the company should have in operation a telephone system serving 20,000 *bona fide* subscribers.

If the company did not have in operation on June 2, 1911, and continuously thereafter, a telephone system serving 20,000 *bona fide* subscribers, and by reason thereof the City had the right to enforce a forfeiture, is the City still entitled to the forfeiture, or has it waived its right thereto?

The intent on the part of the City to waive its right to a forfeiture for non-compliance with the conditions of the ordinance in respect to the time within which the company should have in operation a telephone system serving 20,000 *bona fide* subscribers, might be expressed by an ordinance extending the time therefor, but no such ordinance has ever been passed by the City Council.

It is possible that such intent might be implied in cases where a city has full knowledge that the condition contained in an ordinance requiring that a certain thing be done within a limited time had not been complied with within the time limited, and had thereafter stood by for a long time knowing that the grantee in the ordinance was incurring large expense for additional work without taking steps to enforce the forfeiture or doing anything to indicate that it had any intention of enforcing a forfeiture.

In cases where this principle has been relied upon the work to be done within the given time has been the laying of railroad tracks, or similar work of such character that the City could not in the nature of the case fail to have definite knowledge whether or not the work was done within the time limit.

The situation in respect to the matter under consideration is entirely different. The condition to be complied with was that the company should have in operation by June 1, 1911, a telephone system serving 20,000 *bona fide* subscribers.

Whether this condition had been complied with could not

be ascertained by an inspection of physical conditions, as in the case of railroad tracks. Even if the company had in operation on June 1, 1911, a telephone system serving 20,000 persons, the condition of the ordinance would not have been met unless each of the 20,000 persons was a *bona fide* subscriber.

Whether the company in fact had in operation on June 1, 1911, a telephone system serving 20,000 *bona fide* subscribers was a matter, the knowledge of which rests peculiarly with the company and which would be difficult for the city to ascertain.

On June 5, 1911, a resolution was adopted by the City Council which was as follows (C. P., 404) :

“RESOLVED, That the Committee on Gas, Oil and Electric Light be and the same is hereby instructed to forthwith make investigation as to whether the requirements of said amendatory ordinance of June 28, 1909, have been complied with, and to report its findings, together with its recommendations thereon, to this council.”

On July 17, 1911, an order was passed by the City Council, which was as follows (C. P., 1007) :

“ORDERED, That the City Electrician report at the next meeting of the City Council what progress has been made in the investigation of the Illinois Tunnel Company as to whether or not the said Illinois Tunnel Company has complied with the ordinance requiring said company to have a specified number of telephone subscribers by June 1, 1911.”

On September 25, 1911, Hon. William Carroll, City Electrician, sent a communication to the City Council reporting the action that had been taken by him in compliance with the aforesaid order passed July 17, 1911.

Thereafter, under date of September 28, 1911, the City Electrician forwarded to the Committee on Gas, Oil and Electric Light his report on investigation of the Automatic Telephone Company's plant as far as completed up to that date.

The above mentioned communication and report of the City Electrician indicated that there was grave doubt whether the company had the requisite number of *bona fide* subscribers on June 1, 1911.

The proceedings above referred to, which were well-known to the Illinois Tunnel Company and its receivers, and to the public, did not indicate an intent on the part of the city to waive the city's right to enforce a forfeiture if, in fact, the company did not have in operation a telephone system serving 20,000 *bona fide* subscribers on June 1, 1911, but indicated that the City Council desired information on the subject-matter for use as it might see fit.

If, after June 1, 1911, the company made expenditures for extensions to its system under the circumstances above set forth, it did so at its own risk with full knowledge of the fact that the city was endeavoring to ascertain the facts which might constitute grounds for a forfeiture of the company's rights under the ordinances, together with its property, and the company cannot, in our opinion, avail itself of such expenditures as a basis for avoiding a forfeiture if the facts warranting a forfeiture existed on June 2, 1911, or at some time thereafter.

We are of the opinion that the city has not waived any right of forfeiture it may have had on June 2, 1911, or thereafter.

Your further inquiry is as to whether it is necessary for the city to prove that the company did not have telephones serving 20,000 *bona fide* subscribers on June 1, 1911, or whether the city can force the Illinois Tunnel Company to prove that it had the requisite number of telephones on that day.

The ground for the forfeiture would be that the company did not on June 2, 1911, and continuously thereafter, have in operation a telephone system serving 20,000 *bona fide* subscribers.

The city should be satisfied of this fact before it should undertake to enforce a forfeiture.

If the State's Attorney, or the Attorney General, at the request of the city, should bring a proceeding against the company in the nature of a quo warranto, the company would be required to show that it had complied with all the conditions of the ordinance, and the burden of proof would be upon the company to show that it had in operation on June 2, 1911, and at all times thereafter, a telephone system serv-

ing 20,000 *bona fide* subscribers. Doubtless the State's Attorney or the Attorney General would require a satisfactory showing as to the existence of the ground of forfeiture before they would ask leave of court to file an information in quo warranto, and the court to whom the petition for such leave would be presented, would also, doubtless, require such a showing before granting such leave. If, however, leave should be granted by the court to file the information, the burden of proof would then be cast upon the company.

If, on the other hand, the city should institute a suit to have a forfeiture judicially declared, it would be necessary for the city to allege and prove the ground for a forfeiture, namely, that the company did not on June 2, 1911, and continuously thereafter, have in operation a telephone system serving 20,000 *bona fide* subscribers.

The question as to where the burden of proof would rest would depend largely upon the nature of the proceeding involving the determination of the city's right to a forfeiture.

In the above mentioned suit in the United States District Court in which the receivers for the Illinois Tunnel Company were appointed, notice has been published that in pursuance of a decree entered in said cause, Charles B. Morrison, as Special Master Commissioner, will, on March 25, 1912, sell at public auction to the highest bidder as an entirety the property of said Illinois Tunnel Company, including all of the right, title and interest of said Illinois Tunnel Company, or of its receivers, in the hereinabove mentioned ordinances passed by the City Council of the City of Chicago.

If the City Council should be of the opinion that grounds for a forfeiture exist, and shall determine to enforce such forfeiture, it would be advisable to take steps for the enforcement of the forfeiture before said sale is had in order that the purchaser at the sale may, at the time of the sale, have notice of the forfeiture.

We return herewith letter of William Carroll, City Electrician, to Hon. Charles Twigg, Chairman, Committee on Gas,

Oil and Electric Light, dated September 28, 1911, together with the papers thereto attached.

Yours respectfully,

BRYAN Y. CRAIG,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

MARCH 8, 1912.

HON. HENRY STUCKART, City Treasurer.

Dear Sir:

The communication of J. Lindheimer, Esq., Assistant City Treasurer, concerning the transfer of certain amounts of the proceeds of bond issues to the Corporate Fund, was referred to me for reply.

The City Council on February 5, 1912, Council Proceedings, page 2756, passed an order directing the City Treasurer and the City Comptroller to transfer certain funds from the proceeds of the bridge bonds, recently issued, to the Corporate Fund on account of expenditures made of corporate funds for bridge construction previous to the passage of the bond issue ordinance, and you ask for an opinion from this department as to the right of the City Treasurer to use money received from the sale of bridge bonds for such reimbursement of the Corporate Fund.

I had occasion some time ago to pass on this same question for the Comptroller, and I will repeat substantially what I stated to him, my opinion being that this could be legally done. I find that in the appropriation bill for 1910, there were certain sums appropriated for the construction of bridges to be paid for out of the Corporate Fund. Said appropriation provided that the same should be "reimbursed from bond issue."

There was also an appropriation made at the same time, providing for the construction of new bridges and including the amounts so appropriated for from the Corporate Fund, which was to be taken from and was contingent on the issuance of bonds. This appropriation bill was, of course, duly

advertised so that notice was given of the intention to use money from the bond issues in this way.

While provision was made in this manner for reimbursing the Corporate Fund, no bonds were issued in 1910. The same thing was done when the appropriation bill for 1911 was passed, but in the year 1911, a bond issue for the purpose of constructing bridges was submitted to the people and passed. The question you asked was whether it is now proper to transfer funds from the proceeds from this bond issue to the Corporate Fund to the extent of the amounts so intended by ordinance to be reimbursed. The council order was drafted by me after due consideration, and was passed by the City Council as stated above.

There seems to be no valid objection to such a procedure. The power to borrow money for corporate purposes and issue bonds therefor is not limited to an improvement to be made in the future, but it is entirely proper to issue bonds for existing indebtedness that has accrued on such improvement. The only limitation in the present instance, if it could be regarded as a limitation, would be the wording of the ordinance providing for the issuance of bridge bonds. Such ordinance states that bridge bonds are authorized "for the purpose of constructing bridges in the City of Chicago."

A very narrow construction of this wording might limit the uses of the fund to be derived from these bonds to future construction work, but in view of the fact that the City Council expressly provided for reimbursement of the Corporate Fund from the bond issue for payments made on these bridges which are incomplete and which may be completed out of such bond issue, indicates clearly that the use of the funds derived therefrom in this way was contemplated.

It would have been better, perhaps, to have added in the ordinance, authorizing the issuance of these bonds, a clause to the effect that money could be used from same to reimburse the Corporate Fund, but this would have been necessary only to set at rest a very remote doubt, one so remote in fact, that I do not think it should be taken into consideration.

It cannot be said that the people in voting on the bond issue were not fully advised of the use which the council in-

tended to make of the money. Such being the case, the City Council has the right to order the transfer of such funds in order to reimburse the Corporate Fund.

I may say in this connection, that it was proposed originally at the time I drafted the order authorizing such transfer of money to reimburse the Corporate Fund for certain wages of employes which would have properly come under this provision, but which the City Council omitted to include therewith. As to these wages I advised the City Comptroller that it was not proper at this time to transfer such moneys.

Therefore, I am convinced that although the work was performed previous to the issuance of the bonds, the Corporate Fund may be reimbursed in this way from the proceeds realized on same.

Yours respectfully,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

MARCH 11, 1912.

HON. JOHN E. TRAEGER, City Comptroller.

Dear Sir:

The questions presented by your communication of recent date are:

First. If sinking fund moneys shall be invested in tax anticipation warrants, shall the interest from such warrants be credited to the corporate fund or should it be credited to the sinking fund?

Second. Must the interest on sinking fund bank deposits be credited to the sinking fund or may such interest be credited to the corporate fund?

Section 1 of an Act approved June 5, 1911, entitled "An Act concerning Municipal Funds," provides,

"that every city, incorporated town or village, now or hereafter holding in its treasury any fund set aside for use for some particular purpose, that is not immediately necessary for such purpose, may by ordinance of the City Council of such city or Board of Trustees of

such town or village, use the money in such fund in the purchase of tax anticipation warrants issued by said city, town or village, against taxes levied by said city, town or village; such warrants to bear interest not to exceed four per cent. per annum, and all interest upon such warrants, and all moneys paid in redemption of said warrants shall be at once credited to and placed in such fund so held by such city, town or village.”

This section, omitting inapplicable words, may be read as follows:

“that every city now or hereafter holding in its treasury any fund set aside for use for some particular purpose (that is not immediately necessary for such purpose) may, by ordinance of the City Council, use the money in such fund in the purchase of tax anticipation warrants and all interest upon such warrants shall at once be credited to and placed in such fund so held by such city.”

Your communication states that the interest on sinking fund moneys has heretofore been credited to the corporate fund, but that this was before the passage of the statute hereinabove referred to. It is a familiar canon of statutory construction that the words in a statute must be read with reference to their plain, ordinary signification. It is apparent in reading the statute that it was the intention of the legislature that all increment from the use of the unemployed moneys of various city funds should be returned to such funds.

The words “all interest upon such warrants * * * shall at once be credited to such fund” can, in my opinion, convey but one meaning and be subject to but one interpretation, and that is, that the interest arising from the investment of sinking fund moneys in tax anticipation warrants should be returned to the fund from which the moneys were obtained and by which the purchase of the warrants was effected.

According to this view of the case, the interest from tax anticipation warrants, which you propose to purchase with sinking fund moneys in accordance with the ordinance heretofore adopted, should be credited to the sinking fund and not to the corporate fund.

Second. Must the interest on sinking fund bank deposits

be credited to the sinking fund or may such interest be credited to the corporate fund?

Section 12 of Article IX of the constitution of 1870 provides, among other things, as follows:

“* * * Any * * * municipal corporation, incurring any indebtedness as aforesaid, shall before or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same.”

Following the above limitation upon the method of contracting indebtedness, the legislature has provided by the fifth clause of article V of chapter 24, that the City Council shall have power

“To borrow money on the credit of the corporation for corporate purposes, and issue bonds therefor, in such amounts and form, and on such conditions as it shall prescribe, * * * and before or at the time of incurring any indebtedness, shall provide for the collection of a direct annual tax sufficient to pay the interest on such debt, as it falls due, and also to pay and discharge the principal thereof within twenty years after contracting the same.”

By the sixth clause of the same article, the city may “issue bonds in place of or to supply means to meet maturing bonds, or for the consolidation or funding of the same.”

Section 6 of article VII of chapter 24 provides, in regard to the city treasurer:

“He shall keep a separate account of each fund or appropriation, and the debts and credits belonging thereto.”

Section 4 of article VIII provides, in part, that,

“Whenever any city * * * is required to levy a tax for the payment of any particular debt, appropriation or liability of the same, the tax for such purpose shall be included in the total amount assessed by the city council, * * * and certified to the county clerk as aforesaid; * * * and the city * * * treasurer shall set apart such proportion of the tax collected and paid to him for the payment of such particular debt, appropriation or liability, and shall not disburse the same

for any other purpose until such debt, appropriation or liability shall have been discharged.”

The provision of the constitution above quoted is mandatory and self-executing. Under its provisions, the ordinance authorizing an issue of bonds must in one of its sections provide for the payment of the principal within twenty years.

The sinking fund in question is money now lying in the city treasury (or its bank depositories) as the result of the provisions of said ordinances. It was levied for the purpose of retiring such bonds, collected from the people by taxation for that purpose, and cannot be lawfully used for any other purpose, and an attempted misapplication of the sinking fund itself might be immediately prevented by injunction on the part of any taxpayer.

So much for the sinking fund itself.

Turning to the question of whether the increment arising from the sinking fund may be used for purposes other than those of the sinking fund, we are met by a remarkable paucity of judicial decision. The authorities which we have been able to collate on this question, however, leave no doubt in our mind as to the proper course to be pursued in the premises.

In the case of *Chamberlain v. City of Tampa*, 40 Fla. 74, the city was limited to a levy of ten mills for general municipal purposes, five mills for waterworks and fire protection and three mills to pay bond interest, and was forbidden to make appropriations in any one year for a greater amount than it was allowed to collect by taxation, the taxing power being subject to the above limitations. The facts in the particular case were that the city had exhausted all the money collected by taxation for general municipal purposes, and there was in the treasury only money to the credit of the bond interest fund. This latter fund at the time showed a surplus of \$2,300, which was not needed to meet interest payments on bonds and would apparently not be needed in the future, as by the time the next interest became due provision could be lawfully made by the council to meet such payment. It was considered in fact by the court and counsel as *surplus* money in the interest fund.

An extreme emergency had arisen necessitating the discontinuance of the most necessary sanitary improvements by the municipality. It was admittedly highly essential for the protection and preservation of the health of the city that such improvements should continue. No funds for the running expenses of the fire department were at hand and the lives and property of the citizens were thereby endangered, and it was proposed, in order to meet these imminent necessities that the surplus \$2,300 from the interest fund should be appropriated for these corporate purposes. The court, in denying the municipality the right to so use this fund, says:

"This levy was required for the specific purpose of meeting accruing interest on bonds, and so long as the city has outstanding bonds upon which interest falls due at stated intervals, the city has no power to divert the money raised by such levy to other purposes than the payment of such interest. * * * It (the city) had already levied and collected every dollar that it was authorized to collect during the fiscal year for these purposes (fire and sanitary) and it possessed no power to enforce any further contributions to those funds from its property holders by direct taxation. To permit it to transfer from another fund enforced for a special purpose, an amount for the benefit of those named would be indirectly authorizing the city to collect and appropriate taxes for general purposes and for water works and fire protection in excess of fifteen mills. The injury to taxpayers from such a course is obvious. With \$2,300 to the credit of the interest fund, the tax for this fund for 1894 would have been greatly reduced from that of the previous year. The legislature never intended that the special levy for interest on bonds should be applied to general purposes, or for water works or fire protection. * * * These critical periods will often occur in corporate as well as individual affairs whenever necessary expenditures exceed possible incomes, but they can furnish no excuse for a municipal corporation to divert its revenues from their legitimate purpose to another not authorized by law, however beneficial or meritorious. The city council is invested with a large discretion in administering the city's financial affairs, but this discretion does not authorize them to divert taxes, set aside by its charter for a special purpose, to other purposes, so long as the special purpose exists, without legislative sanction. *State ex rel. Barton v. Hopkins*, 12 Wash. 602."

The rationale of the foregoing case applied to the present situation easily demonstrates that if the interest on the sinking fund is turned back into the sinking fund it will occasion an increment of such fund whereby future taxation to meet the bonds at their maturity and at interest periods will be materially lessened. Even in a case of the most overweening necessity, such as above cited, courts have hesitated to allow a diversion of any part of a sinking fund to other corporate purposes.

It is stated by text writers that all proceeds of the sale of bonds issued for a particular purpose, premium included, belong to the fund to which they were dedicated.

People v. Dakin, 43 Hun 382.

If the increment arising from the sale of bonds is to be credited to the fund, we can see no reason why the increment consisting of the interest earned by the fund should not be likewise thus credited.

In *Elser, Treasurer, v. City of Ft. Worth*, 27 N. W. 739, in regard to the investment of sinking funds, the court defines a sinking fund as follows:

“The aggregate of sums of money (as those arising from particular taxes or sources of revenue) set apart and invested, usually at fixed intervals, for the extinguishment of the debt of a government or corporation, by the accumulation of interest.”

It will be noted that in this definition it is stated that the purpose of the sinking fund is the extinguishment of the debt by means of the interest earned by the fund, and, in speaking of this particular feature, the court say:

“Again, while it may be conceded that preservation is the principal object to be accomplished in dealing with these sinking funds, it is clear that their earning capacity in the way of interest should not be entirely ignored.”

Another view of the law of this case strengthens our opinion that the city holds the sinking funds as trustee for the bondholders.

The sinking funds are impressed with all the characteristics of trust funds in trust for bondholders as *cestuis que trustent*. Therefore, here the well-known equity maxim that

a trustee cannot use his trust in such a manner as to produce gain or advantage to him, applies.

Were the city to use the sinking funds to which they have merely the legal title (the equitable title being outstanding in the bondholders) for the purpose of meeting their ordinary corporate expenses, it would be so using the equitable interests of the beneficiaries for its own use. Everything that the trustee makes must go to the benefit of his beneficiary, and so everything that the city makes by way of interest from the sinking fund must go to the benefit of the beneficiary bondholders in providing additional security for the payment of the outstanding obligations.

Nor can it be doubted that such a course, in addition to being in strict conformity with the law, would have the advantage of assuring bond investors that the funds upon which their securities were founded, were being increased by other means than those of direct taxation.

This sense of security in the fund for the redemption of the bonds would, of necessity, not only place these obligations upon a higher plane as investment securities, but as an indirect result enable the city not only to sell its bonds at a higher premium, but to market them with a lower interest obligation.

In this view of the case, I am of the opinion that the interest resulting from the investment of sinking funds must be returned to such funds, and cannot be devoted to other corporate purposes.

Yours respectfully,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WH. H. SEXTON,
Corporation Counsel.

MARCH 18, 1912.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

By letter of February 17, 1911, your committee requested an opinion from this officer as to whether or not the fact that Charles Lange obtained a building permit for erecting build-

ings on two lots, but erected a building only on one lot entitled him to a refund for a portion of the building permit fee, and also as to what authority there is for calculating a refund as set forth in a letter from the Commissioner of Buildings accompanying the request.

There is no doubt that where a person in the absence of fraud or mistake and without compulsion of the person or goods, and not under protest, pays a license fee to the city, he cannot afterwards recover it back. This rule holds good even where the ordinance by virtue of which the license fee was required is found invalid.

City of Chicago v. Klinert, 94 Ill. App. 524.

Holder v. City of Galena, 19 Ill. App. 409.

The same reasoning applies to a refund of a permit fee of any kind with even greater force, as a license fee is as a rule the means of collecting revenue while a permit fee is intended only to be of sufficient amount to cover the actual cost of inspection and issuance of the permit.

The policy of the City of Chicago in regard to rebate or refund of any license fee or part thereof would therefore also apply to the refund of part of a permit fee. This policy is shown by section 1516 of The Chicago Code of 1911, the second paragraph of which reads as follows:

“In no event shall any rebate or refund be made of any license fee or part thereof by reason of the death of the licensee or by reason of non-user of such license or by reason of a change of location of such licensee.”

This case clearly comes under the policy shown by the above section, as it is a request for a refund merely by reason of non-user of the permit fee as to a part thereof. I would therefore advise you that there is no cause for refund of any portion of the permit fee in question.

Respectfully yours,

CRAWFORD ROSS,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Acting Corporation Counsel.

MARCH 18, 1912.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Your letter transmitting a communication from the officers of the West End Woman's Club requesting the remission of the license fee for their club house, was referred to me for an opinion.

The letter states in substance that the club is an organization doing philanthropic and civic work, that it is situated in a locality which demands the kind of activities it is engaged in, that in connection with its work the club gave Sunday concerts for the benefit of the people of the West Side, where the music was furnished by members of the Theodore Thomas Orchestra which added \$300 to its debt, that it has what it calls a "Saturday Night Open Door" for the young girls and boys of the West Side. The letter then goes on to state that in order to meet expenses it rents out its club house to social and fraternal organizations who use it for pleasure and not for profit.

The letter also says that no license fee has ever been required of them, and intimates that the renting of their auditorium for the above purposes does not place their club house in the class of dance halls and theaters which operate for profit.

In addition to the facts set forth in their letter the officers of the club informed you that the hall in their club house is rented at different times for neighborhood dances to which an admission fee is charged.

Section 107 of The Chicago Code of 1911 provides that no one shall "give, conduct, produce, present or offer for gain or profit," any entertainment of the classes enumerated without a license. Section 108 uses similar words in relation to the application for a license. Section 106, which classifies the different kinds of amusement, uses the following language:

"All theatricals, shows and amusements offered, operated, presented or exhibited for gain, or for admission to which the public is required to pay a fee, are hereby divided into the following twenty-one classes."

The sentence just quoted must be held to explain the

words used in Sections 107 and 108, since all three sections are to be construed together. Consequently, the question hinges on the interpretation of the above excerpt.

A very narrow way of interpreting this would be to hold that the words "or for admission to which the public is required to pay a fee" are simply explanatory of the clause immediately preceding them, in which event no entertainment for which an admission fee is charged would come outside of the classification. But the provision was unquestionably intended to be liberally construed; and it is on account of the liberal construction placed upon it by the city's officials that the question has arisen and is attended with difficulty. It is not always plain where the line is to be drawn.

In the present instance, however, there can be no doubt concerning the propriety of collecting a license fee. It is not the ultimate object for which the money that is received is to be used, but the immediate purpose of earning money that is the determining factor.

Thus, if the club gives such a concert as is described, for a nominal admission fee, at a loss to itself, the license provision will not apply, because it does not give the concert for gain or profit. The license fee may even be overlooked if the admission fee charged is not a nominal one, provided the club gives the entertainment itself and it is strictly in line with its philanthropic activities. But if it rents the hall to another organization which gives an entertainment, it is not the character of the entertainment that is to be considered, but the fact that the hall is rented for gain.

The officers of the club, in their letter, say: "To eke out our income to pay our building indebtedness and current expenses, we rent our clubhouse to social organizations," etc. In other words, the rent of the hall and club house for purposes of entertainment is a source of income to the club. The application of the fund after it has accrued from these rents is not what concerns the city.

However worthy may be the objects of the club, or however desirable it may be to encourage the officers of same in their work, the city's officials cannot avoid their plain duty, which admits of no discretion. The law does not contemplate

that an inquiry shall be made in each case as to whether the earnings are to be applied to future philanthropic work.

Therefore, since the renting of the hall and club house is not a part of the communal and civic work of the club, but is designed to raise revenue to carry on its work, the license fee ought to be paid.

The letter of the officers which you sent with your own, is returned herewith.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Acting Corporation Counsel.

MARCH 19, 1912.

TO THE HONORABLE THE CITY COUNCIL OF THE CITY OF
CHICAGO.

Gentlemen:

At the meeting of your Honorable Body held March 11th, a resolution was adopted in regard to the installation of meters by the Chicago Telephone Company which was in part as follows (C. P. p. 3151):

“Resolved, That the Corporation Counsel of the City of Chicago be directed to furnish, at the next regular meeting of the City Council, an opinion to this Council as to whether the city can legally compel the installation of such meter or meters in the office, residence or place of the said subscriber or the said subscribers.”

In compliance with said resolution we respectfully submit the following:

Subdivision (g) of section 6 of the ordinance passed November 6, 1907, authorizing the Chicago Telephone Company to construct, maintain and operate a line of telephone wires in the City of Chicago, which ordinance constitutes the contract under which said telephone company is now operating, is, in part, as follows:

“(g) Meters on Measured Service Lines.

The Chicago Telephone Company shall install in connection with each measured service line of its lessees and

subscribers a meter which shall prove effective in actual use for accurately and correctly recording the number of outgoing messages or conversations over said line, and *at any time that a practicable meter for use upon the premises of the lessee or subscriber in connection with such line shall be devised and prove effective in actual use* for accurately and correctly recording outgoing messages or conversations, as aforesaid, *the company shall install the same* in connection with each line of its lessees of and subscribers to measured service upon their premises."

Said subdivision (g) of section 6 further provides as follows:

"If any question shall arise as to whether any meter or meters hereinabove provided for shall reasonably protect the lessee or subscriber in the counting of outgoing messages, or as to *whether or not a practicable meter for use upon the premises of the lessee or subscriber to a measured service line has been devised and proved effective in actual use* for accurately and correctly recording outgoing messages or conversations, as aforesaid, such question or questions shall be submitted to the Chairman of the Finance Committee of the City Council, the Commissioner of Public Works, and the Corporation Counsel, who shall together *hear such facts as may be presented by the parties to the controversy, and they, or a majority of them, are hereby given the power to decide such question or questions,* and to require said Chicago Telephone Company to make such changes in any meter or meters, or the method of operating the same, as they shall deem reasonably necessary to protect the lessees and subscribers of said Chicago Telephone Company to measured service, and to require the installation by said company of a new meter or meters for use upon the premises of the lessees and subscribers, and to take any other action in the premises which they shall deem reasonably necessary to protect the lessees and subscribers of said company."

On May 18, 1908, the following resolution was adopted by the City Council (C. P. p. 298):

"Resolved, By the City Council of the City of Chicago that the said Chairman of the Finance Committee of the City Council, the Commissioner of Public Works and the Corporation Counsel be and they are hereby requested to determine whether or not a practicable meter

or meters for use upon the premises of lessees or subscribers to the measured service of said Chicago Telephone Company has been devised and proved effective in actual use for accurately and correctly recording outgoing messages or conversations over the lines of such lessees or subscribers, as provided for by and under such ordinance as aforesaid; and to take such other action in the premises which they shall deem reasonably necessary to protect the lessees and subscribers of said company, under the terms and provisions of such ordinance as aforesaid."

On November 27, 1909, the Commission named by the ordinance consisting of the Chairman of the Finance Committee of the City Council, the Commissioner of Public Works and the Corporation Counsel, sent a communication to Mr. B. E. Sunny, President of the Chicago Telephone Company, referring to and enclosing copies of certain engineers' reports. The concluding paragraph of said communication was as follows (C. P. p. 1852):

"We are advised in these reports that a meter has now been devised, meeting the requirements of the ordinance, and we hereby order the Chicago Telephone Company to comply with the said ordinance, by installing upon the premises of the lessee or subscriber, a practical meter which will accurately and correctly record the number of outgoing messages or conversations. Our conclusions are based on the engineers' reports."

Under date of November 29, 1909 (C. P., p. 1903), President Sunny replied to the communication last above referred to and among other things said:

"From the reports and the facts, as we now have them, it can hardly be said that, in the words of the ordinance, 'a meter has been devised and proven effective in actual use for accurately and correctly recording outgoing messages or conversations.'"

It will be observed that the Commission in its communication of November 27th to the President of the Chicago Telephone Company does not state that the Commission had determined or decided that a practicable meter had been devised and proved effective in actual use. The statement in the communication is to the effect that the Commissioners were advised in the engineers' reports referred to that a me-

ter had been devised meeting the requirements of the ordinance.

The communication of the Telephone Company replying to the Commission's communication does not admit that a meter had been devised and proven effective in actual use, but states that such can hardly be said to be the fact.

We are of the opinion:

1. That under the provisions of the ordinance, the Chicago Telephone Company can be required to install a meter in connection with each measured service line at any time that a practicable meter for use upon the premises of the lessee or subscriber in connection with such line shall be devised and proved effective in actual use for accurately and correctly recording outgoing messages or conversations.

2. That if the question arises as to whether or not a practicable meter has been devised and proved effective in actual use, the Chairman of the Finance Committee of the City Council, the Commissioner of Public Works and the Corporation Counsel, or a majority of them, have the power to decide such question, after a hearing by them of such facts as may be presented by the parties to the controversy.

3. That it does not appear that the Telephone Company has conceded, or that the Commission named in the ordinance has decided, that a practicable meter has been devised and proved effective in actual use.

4. That unless it shall be conceded by the Telephone Company that a practicable meter has been devised and proved effective in actual use, that question should be passed upon and decided by the Commission named in the ordinance before the company could be required to install the meters.

Respectfully submitted,

BRYAN Y. CRAIG,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Acting Corporation Counsel.

MARCH 19, 1912.

HON. HENRY ERICSSON, Commissioner of Buildings.

Dear Sir:

Your letter of recent date, concerning a moving picture theatre in which the entrance is from the side of the auditorium and in which you inquire whether you can disregard the provisions of paragraph (g) of section 402 of the Code, was referred to me for consideration and reply.

The paragraph in question reads as follows:

“(g) If the principal entrance corridor of a theatre is at one side and approximately at right angles to the central axis of the audience room, then the center line extended of such principal entrance shall intersect the center axis of the stage and the audience room between the back of the seat most remote from the stage, on said center axis of the stage and the audience room and at a point midway between such seat and the wall opposite the proscenium wall.”

The general requirement of the above paragraph is that where the entrance is from the side of the auditorium instead of from the back, such entrance must be at the extreme end so that all persons coming in from this main entrance will be at the back of the theatre when they enter.

The architect for the moving picture theatre in question submitted his plans to me showing that the arrangement, in this case, is peculiar. The building is to occupy ground near the southwest corner of 35th street and Michigan avenue. The entrance is to be from 35th street. There is an alley to the west of the theatre and there is an open passageway extending around the theatre (except where it is intersected by the main entrance) and opening into the alley on both sides. If the main entrance were placed at the end of the auditorium, such entrance would be alongside the alley and would block off the passageway on that side.

The owner went ahead on a temporary permit, and the building is partly constructed with the entrance much nearer the front end of the auditorium than the rear end. There is one store of the building east of this entrance, and two stores west of same. The owner is also, by reason of the fact that he was led to believe that his plans would be approved, in the

embarrassing position of having leased that portion of the building which would have to be used for an entrance under the section quoted above if he could not be relieved of the necessity of putting it there. The place is rented for a store. Owing to that fact and the fact that the building is well under way, to change the plans at this time would entail serious loss to him. While it is true that a mistake on the part of the city's agents who allowed him to proceed temporarily would not bind the city, nevertheless, since the mistake was made, it is a matter to be taken into consideration.

The architect called my attention to the fact that if the entrance is put at the end, as required by section 402 (g) for theatres of class 5 hereafter erected, the passageway on the north side of the auditorium would be of comparatively little value, since, in order to afford a means of egress, a person would have to go around the building. On the other hand, this north passageway would be a ready means of emptying the auditorium, in an emergency, if it were open from the proposed main entrance to the alley as contemplated in his plans.

In your letter you intimate that this scheme of exits would be safer than could be obtained by observing paragraph (g), above quoted, and you give this as a possible reason for disregarding the provisions of this paragraph and the approval of the plans for the building.

If this case were one where you were substituting your discretion and were being guided by your own judgment as to the safety of these exits as against the plain provisions of the ordinance, I would have no hesitation in saying that, although you might consider the plan he proposes safer than that required by ordinance, nevertheless the ordinance would have to be followed; but I find in this case that there is enough doubt whether the paragraph under consideration applies to warrant the exercise of your discretion.

There are three kinds of buildings which must be constructed in accordance with the provisions relating to class 5. Section 369 requires that every public theatre with movable scenery, whether the seating capacity is less than 300 or not, must be so constructed; also, every assembly hall with a seat-

ing a capacity of more than 300 which contains a permanent stage on which scenery and theatrical apparatus are used and regular theatrical vaudeville performances are given. The third class is the class which this building comes under, governed by Section 304, which says:

“Every building hereafter erected used for theatrical purposes with a seating capacity greater than 300 shall be built to conform to the requirements of buildings of class V hereafter erected.”

It will be observed that the ordinance makes a distinction between a regular movable scenery theatre and the other two kinds of buildings included within the classification. Under the heading “Buildings of Class V Hereafter Erected,” there appear numerous provisions which are intended to apply to all three. In most instances, these provisions are spoken of as being required by “buildings used for the purposes of Class V” or “rooms used for the purposes of Class V.” There are some which clearly fit only in the case of movable scenery theaters, and in those places the word “theatre” is used.

While this distinction has not been followed out absolutely throughout the ordinance, still it has been done to such an extent that there seems to be ground for doubting whether paragraph (g) of section 402 was intended to apply to moving picture theatres.

One of the reasons why I feel that the provision in question may be of doubtful application to such places, is the fact that a greater degree of danger exists in the rear of a moving picture theatre than at any other place, since the picture apparatus is located there.

While I would not advise, ordinarily, that this provision should be departed from, it seems to me that under the peculiar conditions existing here, if you believe that the construction contemplated will lead to greater safety, the ordi-

nance gives you enough latitude to exercise your discretion and to allow the owner to proceed.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Acting Corporation Counsel.

MARCH 21, 1912.

HON. CARTER H. HARRISON, Mayor of the City of Chicago.

Dear Sir:

We are in receipt of your communication of March 19th, asking whether it is within the power of the law to prohibit the employment of girl clerks in cigar stores and saloons for the purpose of shaking dice for cigars.

Section 126, Chapter 38, of Hurd's Revised Statutes of 1909, is as follows:

“Whoever shall play for money or other valuable thing, at any game with cards, dice, checks, or at billiards, or with any other article, instrument or thing whatsoever, which may be used for the purpose of playing or betting upon, or winning or losing money, or any other thing or article of value, or shall bet on any game others may be playing, shall be fined not exceeding \$100 and not less than \$10.”

Section 978 of The Chicago Code of 1911 is as follows:

“No person shall deal, play, or engage in faro, roulette, or gambling for money or other valuable thing, or in any other device or game of chance, hazard, or skill, either as bookmaker, dealer, keeper, player or otherwise, for the purpose of gaming or gambling for money or other valuable thing, under a penalty of not exceeding two hundred dollars for each offense.”

Under either of the foregoing provisions, the Mayor is authorized to take such steps as he deems necessary to prohibit persons operating cigar stores and saloons from conducting the game of dice or permitting it to be played for cigars, whether the player be a male or female clerk.

We are, however, of the opinion that it would contravene public policy for the City of Chicago to pass an ordinance

prohibiting *females* from shaking dice for cigars, since such action might be construed as thereby impliedly sanctioning the playing of such games by *male* persons. We believe that such an ordinance would be against the public policy of the state, as manifested by Section 126, Chapter 38, of the statutes hereinabove quoted, which makes it unlawful for *any person* to play such games for money or other valuable thing.

Respectfully submitted,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Acting Corporation Counsel.

MARCH 22, 1912.

HON. JOHN E. TRAEGER, Comptroller.

Dear Sir:

Replying to your letter of March 14, 1912, in re hospital licenses, I beg to advise you.

Your question is presented by a supposed case as follows:

A hospital makes a showing that during the year it has entertained a certain number of patients and that it has taken them at less than the usual rate, for example, a \$14 room and attendance is given to a patient who pays \$7 therefor, because of the inability of the patient to pay the full rate. Can the \$7 per week thus discounted from the patient's bill be charged as charity so that when discounts of this kind amount to 10 per cent. of the year's business the hospital will be entitled to a license without cost?

Section 1216 of the Chicago Code of 1911 uses the language:

"The license fee to be paid annually to the city collector for such hospital license shall be one hundred dollars * * * provided, that if an affidavit is made by the applicant for such hospital license that the said hospital during the previous calendar year has given to its patients not less than ten per cent. of its general average capacity of bed days for such calendar year free of charge of any sort (by bed days being meant the use of one bed for one day and its proportionate use of equipment and cost of maintenance, including food, medicine

and care of nurses and physicians), then an inquiry shall be made into the facts set forth in such affidavit by the commissioner of health, upon whose recommendation the said license fee may be remitted."

I am of the opinion that if a patient is charged any amount, however small, that patient cannot be said to have been cared for "free of charge of any sort" and that however commendable the practice of receiving patients at less than the usual rate may be still under this ordinance no credit can be allowed hospitals for charity extended in this manner.

You should therefore in checking up hospitals refuse to consider these allowances as coming under the Code.

Your letter also asks a construction upon the words "general average capacity of bed days."

I am of the opinion that this should be interpreted as meaning the volume of business actually done as distinguished from the volume of business which might be done if the hospitals were always taxed to their utmost capacity.

Very respectfully,

GEO. L. REKER,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Acting Corporation Counsel.

MARCH 22, 1912.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Your letter in reference to the public exhibition of the bodies of the Guelzow murderers in an undertaking establishment was referred to me for an opinion.

Attached to your letter was an editorial clipping from one of our newspapers headed "A Disgraceful Exhibition," and condemning the police for allowing the gruesome display. You state with reference to same that the matter was not brought to your attention until after the time for action had passed, otherwise you would have called for an opinion as to your power to prevent such a show. You also state that your purpose in asking for an opinion now, is to determine whether you would have a right in the future to forbid a

public display of bodies of persons who had been executed or brought to their death in any other unnatural way, and secondly, if such power is lacking, to ascertain whether an ordinance could be passed giving such power to the Mayor and Police Department.

The power of the Mayor under the conditions referred to would depend altogether on who is responsible for the display. If the undertaker, on his own initiative, was permitting a crowd of morbid curiosity seekers, to enter and view the remains, there is no doubt that you could prohibit the show as an offense to common decency. The right to do so is derived from the common law, which includes within such general classification any display that is repulsive to a person of ordinary tastes and sensibilities.

“Every public show and exhibition which outrages decency, shocks, humanity, or is contrary to good morals, is punishable at common law.”

Knowles v. State, 3 Day (Conn.) 103.

If, however, the family of the deceased agree to or encourage this kind of exhibition as a part of the funeral ceremony, as may have been the case, and the crowd conducts itself in an orderly manner, then, as you suggest in your letter, there is perhaps no legal ground for interference.

There is no such thing as property in a dead body, but there is a right of possession for purposes of proper interment which rests primarily in the next of kin and which the law recognizes as sacred. The right of burial in such manner as they deem proper is theirs exclusively and should not be interfered with. As was said in one case:

“Any infringement upon that right, except where made necessary for the discovery and punishment of crime, violates the tenderest sentiments of humanity.”

Palenske v. Bruning, 98 Ill. App. 650.

The fact that the body may be that of a person executed for crime does not alter the case. The crime has been expiated, and the law takes its hand off after such execution. Consequently the body must be regarded as in the same class with all other dead bodies which lie in state while the friends of the deceased or the public, as the case may be, pass by and look at the remains.

On the other hand, the city, in the exercise of its police powers, may enact an ordinance prohibiting a public display of the dead body of a person executed or brought to his death in an unnatural manner. Such an ordinance would be in the interest of good morals and tend to promote the public welfare, and would therefore be a valid exercise of such powers.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Acting Corporation Counsel.

MARCH 28, 1912.

HON. LAWRENCE E. MCGANN, Commissioner of Public Works.

Dear Sir:

Your communication of the 22d inst. with reference to the question of how to secure title to West 15th Place, between Ashland Avenue and Loomis Street, in such manner as will remove the possibility of dispossessing the city, presents the question of dedication of said street, its acceptance by the city for that purpose, and the city's power to vacate under the statute.

If lands are platted according to statute the fee title to the streets, upon acceptance, vests in the city, while in the case of dedication as at common law, the city merely obtains an easement for street purposes, while the fee remains in the person making the dedication.

Upon vacation by the City Council of a street established by statutory plat, the fee reverts to the dedicator or his heirs, while in the case of the vacation of a street established as at common law, the fee attaches to the owners of the lots or land abutting on the street.

In the case submitted by you there is nothing to show in what manner the dedication for street purposes was made, but assuming from the report of William Hunter, Esq., which is attached to your communication, that West 15th Place is a public street, the city cannot obtain title to the same for the purpose suggested, unless it pursues the following course:

1. If the street was dedicated by plat according to statute, the dedicator or his heirs should quit claim to the city.

2. If the street was dedicated as at common law, the owners of the land abutting on it should quit claim to the city.

I assume from the tenor of your communication, that the land on both sides of West 15th Place has been acquired by railroad companies and is now held by them for railroad purposes.

Should this be the case the companies adjoining the street should quit claim, if the street was dedicated as at common law.

Any act of vacation by the city council before this has been done, would in such case add the street to its center to the respective lands of such companies.

In order that I may be enabled to advise you intelligently, it will be necessary that you should furnish me the surveyor's certificate and owners' acknowledgment attached to the original plat.

Very truly yours,

NICHOLAS MICHELS,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

MARCH 30, 1912.

HON. JOHN MCWEENY, Superintendent of Police.

Dear Sir:

We are in receipt of your recent communication inquiring whether the Standard Wine & Liquor Co., 673 North Clark Street, has the right to light up its show windows on Sundays.

The dramshop ordinance provides (Section 1526, The Chicago Code of 1911) that each applicant for a dramshop license shall execute to the city a bond conditioned, among other things,

"to keep closed on Sundays all doors opening out upon any street from the bar room, or room or rooms where such saloon or dramshop is to be kept, and that all windows opening upon any street from such bar room, or room or rooms, shall on Sunday except between the hours

of one o'clock a. m. and five o'clock a. m., be provided with blinds, shutters or curtains placed and maintained in such a manner as to obstruct the view from such street into such bar room, or room or rooms. * * *

The ordinance makes no reference to lights in saloon show windows or lights in the saloon, except in respect to the lights required to be kept burning in the interior of the saloon between one o'clock a. m. and five o'clock a. m.

The manifest purpose of the ordinance is to provide for shutting off the view from the street into the bar room, or room or rooms where the saloon is kept, on Sunday except between the hours of one a. m. and five a. m.

The means adopted for accomplishing this purpose is the requirement that all outer doors be closed, and that all windows opening upon any street from such bar room or room or rooms, shall have blinds, shutters or curtains placed and maintained so as to obstruct the view from the street into such room or rooms where the saloon is kept.

We are of the opinion that show windows opening upon the street, should, so far as this provision of the ordinance is concerned, be considered as a part of the room or rooms where the saloon is kept, and that the interior of such windows should be shut off from view from the street by blinds, shutters or curtains, on Sunday, except between the hours of one a. m. and five a. m.

We therefore conclude, that the maintaining of lights in the show windows in question on Sundays (except between the hours of one a. m. and five a. m.) would be a violation of the ordinance, unless the interior of the show windows is shut off from view from the street by blinds, shutters or curtains.

We return herewith the correspondence which accompanied your communication.

Yours very truly,

BRYAN Y. CRAIG,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

MARCH 30, 1912.

HON. JOHN E. TRAEGER, Comptroller.

Dear Sir:

The auditor asks for an opinion concerning a building inspector, concerning whose employment there exists the following facts:

The inspector was employed in the building department and on February 10, 1912, he was suspended and charges were lodged against him by the head of his department with the civil service commission. Subsequently (the auditor's communication does not state when, except that it was before March 14, 1912), the charges were withdrawn and he was reinstated on March 14, 1912. He worked during that day and at the close thereof, or early on March 15, 1912, he tendered his resignation to the commissioner of buildings, head of his department, which was accepted. Under these facts what pay, if any, is the comptroller warranted in allowing him between the dates of February 10, and March 14, 1912, inclusive.

The power of suspension is one given to the civil service commission by the civil service act, section 12 whereof making the following provision:

"Nothing in this act shall limit the power of any officer to suspend a subordinate for a reasonable period, not exceeding thirty days."

The word "suspension" as used in the act, in my opinion, contemplates suspension without pay, otherwise the words would be inoperative to give the head of the department any punitive power over the employe. The phrase is not inserted in the act as meaning that the head of the department can merely suspend pending an investigation of the alleged supposed dereliction of the employe. To suspend without the power to stop pay would be not a punishment for the employe but a vacation.

From the facts above stated, the supposition may be reasonably indulged that the head of the department, or the commission, concluded that the employe had been sufficiently punished by the loss of pay and that there was no necessity of pressing the charges against him. In other words that he

had been sufficiently punished and therefore the charges were withdrawn.

There is nothing in the communication submitted to me which shows that the charges were originally ill founded or that there was any lack of proof to substantiate them. Consequently the employe is not entitled to salary during the suspension from February 10, 1912, and extending thirty days therefrom.

The statute limits the suspension, however, to thirty days and this employe is entitled to pay from the expiration of the thirty days' suspension up to the date of his resignation.

Yours respectfully,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

APRIL 1, 1912.

HON. HENRY ERICSSON, Commissioner of Buildings.

Dear Sir:

In your letter of recent date you made inquiry in regard to the interpretation of certain provisions of the Code relating to elevators.

Your first question was whether a building equipped with an automatic sprinkler system must have the basement or lowermost pit level inclosed with fireproof material as provided for in section 683, or whether it is exempt from such provision by reason of the sprinkler system.

The basis for your doubt is the fact that in section 682, which provides that elevator shafts in non-fireproof buildings must be inclosed in a wall of incombustible material from the foundation to the roof, an exception is made of buildings equipped throughout with automatic sprinklers.

The fact that the Code permits the sprinkler system to do away with one requirement that would otherwise be essential furnishes no reason for assuming that the exception was intended to apply to any other requirement, even though the two requirements may be similar in their nature. The excep-

tion is made in the first of two sections following each other. Its very position excludes the idea that it applies to the provision of the second section. No reason appears for any other construction.

On the other hand, there seems to be good reason for assuming that the City Council intended to draw the distinction between the two provisions and to make an exception applicable to only one of them.

Section 682 applies to non-fireproof buildings which are not expressly excepted. In other words, it applies to such buildings where they are not equipped with sprinkler system or automatic hatch closers. Section 683 applies to all buildings. Basements were evidently looked upon as being more dangerous, and therefore the provision for fireproofing the lower levels of the hatch and pit was not relaxed in any case, even where the building is of fireproof construction.

Your next question was whether section 683 applied in the case of a freight elevator equipped with automatic hatch doors or closers fulfilling the requirements set forth in section 686.

This could have been answered in connection with your first question if it were not for the fact that according to your view a compliance with both provisions is a duplication of fire precautions. You say that the operation of the hatch door across the first floor would prevent the fire from spreading up through the hatchway from the basement.

It is obvious that the point you make does not apply to those cases where there is no basement, and consequently no hatch door on the first floor. As to all other cases, while the fireproof inclosure seems at first blush to be a needless precaution, there may be some reason for it, since the rapidity with which a fire may spread from the basement before enough heat is generated at the particular spot necessary to close the hatch doors might result in the climbing of the flames before the doors operate.

This is less likely to happen above the first floor because the heat generated at the bottom would be distributed sufficiently there to cause the doors to drop.

In any event, the provision cannot be done away with

even if it is unnecessary or cumulative. We cannot construe an ordinance so as to eliminate something which is so plainly intended. This holds good even in the face of former ordinances which you speak of, but which are now no longer in force, that did not require both precautions.

Your last question is whether it is necessary to hold back the certificate of inspection, required under section 689, in case the provisions of section 683 above referred to have not been complied with.

There appears to be no reason for withholding the inspection certificates on account of failure to comply with that provision. The inspections and tests to which elevators must be subjected have reference to the safety of the elevator itself, and not the precautionary fire measures designed to protect the building.

There is a clear distinction marked out by the ordinance, and section 689 expressly says that the certificate shall issue if the elevator is found in good condition in the particulars therein set forth, which do not include such fireproof inclosures.

It is proper, therefore, to issue the certificates you speak of.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

APRIL 4, 1912.

HON. G. B. YOUNG, Commissioner of Health.

Dear Sir:

Your communication dated March 21, 1912, addressed to Mr. William H. Sexton, wherein you request an opinion as to whether it will be necessary for the Jewish Consumptive Relief Society to obtain frontage consents and if so what frontage consents will be necessary, has been referred to me for a reply.

You state that the society owns a tract of ten acres of

land on the corner of Fiftieth and Belmont avenues upon which they propose to erect a hospital and that the property surrounding this site is entirely unoccupied except for a small cottage at the corner of North Fiftieth avenue and School street and also a small building about the center of the ten acre tract immediately west of the tract owned by the society.

Sections 265 and 1219 are the sections of our ordinances requiring frontage consents for hospitals. Section 1219 is a repetition verbatim of Section 265 of the Chicago Code of 1911, which provides as follows:

“265. Frontage consents for hospitals.) It shall be unlawful for any person, firm or corporation to build, construct, maintain, conduct or manage in any *block* in which two-thirds of the buildings fronting on both sides of the street or streets on which the proposed hospital may front are devoted to exclusive residence purposes, any hospital, unless the owners of a majority of the frontage in such *block*, and the owners of a majority of the frontage on the opposite side or sides of the street or streets on which said building faces consent in writing to the building, constructing or maintaining, managing or conducting of any such hospital in said *block*. Such written consents of the majority of said property owners shall be filed with the commissioner of health before a permit shall be granted for the building or constructing, or a license be issued for the maintaining, conducting, or managing of any such hospital.”

Under section 711 of The Chicago Code of 1911, the word “block”—embraces only that part of a street bounding the square which lies between the two nearest intersecting streets unless otherwise specifically provided. (At this point we desire to call your attention to the distinction which dictionaries make between the word “*intersecting*” and “*intercepting*” and which has been followed by this office in former opinions. An “*intersecting*” street cuts both sides of a street making four corners, while an “*intercepting*” does *not* cut both sides of a street.)

Under section 265, above quoted, therefore, if two-thirds of the buildings on the street between the two nearest *intersecting* streets are devoted exclusively to residence purposes, it will be necessary to secure frontage consents.

We are attaching hereto a plat which we assume for the purpose of this opinion is correct. The plat shows the ten acre tract of the Jewish Consumptive Relief Society, which is bounded on the east by Fiftieth avenue, on the south by Belmont avenue, on the north by School street, and on the west by another ten acre tract.

It does not definitely appear by the plat whether the hospital will be on Belmont avenue or on North 50th avenue, but we assume that the former is correct. The nearest street which intersects Belmont avenue west of the hospital is 56th avenue and although the plat does not show the nearest street which intersects Belmont avenue west of the hospital, yet a reference to the maps of the map department shows us that it is 48th avenue. The plat also shows only one building in the ten acre tract west of the hospital, but we understand that there are also a very few buildings devoted to residence purposes on Belmont avenue east of the hospital which is not shown on the plat. At any rate we assume there is no question that more than two-thirds of the buildings on Belmont avenue between the two nearest intersecting streets, to wit: 48th avenue on the east and 56th avenue on the west, are devoted exclusively to residence purposes; and although the distance between these intersecting streets is over a mile, at the same time according to the literal requirements of our ordinances the society would have to secure a majority of the frontage on Belmont avenue between these two intersecting streets, to wit: 48th avenue and 56th avenue, as well as a "majority of frontage on the opposite side or sides of street on which the hospital faces" which in this case would be North 50th avenue between Belmont avenue and School street.

On December 6, 1905, Mr. John W. Beckwith, assistant corporation counsel, wrote an opinion to Mr. John E. Traeger which opinion we think throws some light upon the subject under discussion. In Mr. Beckwith's opinion there was a question as to whether or not a block could be bounded by an imaginary line drawn 600 feet south of 51st street and connecting Calumet avenue with Prairie avenue for the reason that 52d street did not cut through. Mr. Beckwith in a full discussion of this subject said on page 3:

"It is admitted that there is no cross street between 53d and 51st streets and I think that according to the sense of the Harrison case, *supra*, the situation must be treated as if the cross street were actually opened half way between 53d and 51st streets."

Mr. Beckwith cites the case of *State v. Deffes*, 44 La. Ann. 164. The gist of this decision is that the normal size of blocks throughout the city is to be considered rather than the particular size which sometimes varies to an unusual extent from the normal.

We think what Mr. Beckwith said in his opinion applies properly in a case where strict compliance with our ordinances would prove unjust and oppressive. There is no doubt but that the block which is now intersected by 48th avenue on the east and 56th avenue on the west and which is now about a mile long will at some future time be intersected by several streets and will contain possibly seven or eight blocks of normal size. A glance at the plat, we think, bears out this view.

We think that you can treat this matter as if Belmont avenue were intersected on the east by 50th avenue and on the west by an imaginary line running south from 51st avenue and intersecting Belmont avenue.

Assuming that two-thirds of the buildings on both sides of *this* block (on Belmont avenue between 50th avenue and the imaginary line running south from 51st avenue and intersecting Belmont avenue) are devoted exclusively to residence purposes then the hospital society must secure frontage consents; otherwise not.

On the other hand, if it is proposed to locate the hospital on 50th avenue instead of Belmont avenue then if two-thirds of the buildings on 50th avenue between Belmont and School street are devoted exclusively to residence purposes, then frontage consents will be required. If on the other hand there are no buildings in this block, then frontage consents will not be required.

Respectfully submitted,
MAX M. KORSHAK,
Assistant Corporation Counsel.

Approved:
WH. H. SEXTON,
Corporation Counsel.

APRIL 6, 1912.

HON. FRANCIS D. CONNERY, City Clerk.

Dear Sir:

You ask (1) on what day or at what time each of the seventeen aldermen-elect not at present on the payroll, shall be placed thereon for the purpose of drawing their salary as aldermen, and (2) for how many days in April are the retiring aldermen entitled to pay?

Section 3, article III, chapter 24 of Hurd's Revised Statutes of 1909 provides:

"Aldermen shall hold their office for the term of two years, and until their successors are elected and qualified."

Section 1, article VI of the same chapter provides:

"There shall be elected, in all cities organized under this act, the following officers, viz: a mayor, a city council, a city clerk, city attorney, and a city treasurer."

Section 4 of the same article provides that

"All officers of any city or village, whether elected or appointed, shall, before entering upon the duties of their respective offices, take and subscribe the following oath or affirmation: * * * Which oath or affirmation so subscribed, shall be filed in the office of the clerk."

Section 16 of the same article provides:

"The mayor of any city, and the clerk of any city or village, shall have power to administer oaths and affirmations upon all lawful occasions."

In speaking of the term of office of town supervisors, whose term of office is provided for in much the same language as that of aldermen, the Supreme Court in *People v. Barnett Township*, 100 Ill. 332, held that the officer would continue to hold office until the qualification of his successor where the law so provided, and in an opinion of this department by the Honorable William G. Beale, Corporation Counsel, it is said, concerning the resignation of Alderman O'Neill, who resigned as alderman of the 34th ward before his term of office had expired:

"His resignation and its acceptance amount to nothing, because he must technically continue to be an alder-

man until his successor, elected at the coming regular election, shall qualify."

(Opinions of the Corporation Counsel, Tolman's Edition, page 6.)

I am of the opinion that the outgoing aldermen will be entitled to hold their offices for the term of two years from and after their respective election and qualification and until their successors, who have now been elected, shall be declared elected by the proper canvassing board and shall also have qualified for office by taking the oath prescribed by statute.

I am also of the opinion as to the seventeen incoming aldermen-elect, that when these gentlemen have been declared elected by the proper canvassing board, or other officials charged with the function of declaring the result of their elections, and shall have taken the statutory oath of office, that they will be entitled at that time to be placed upon the payroll and draw their salary as aldermen.

Very respectfully yours,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

APRIL 10, 1912.

ALEXANDER E. ARKIN, Esq., 1108 Ashland Block, Chicago, Ill.

Dear Sir:

Your letter addressed to the Corporation Counsel asking information concerning persons who buy and sell junk as to their liability for license fees and the location of their shops was referred to the undersigned for consideration and reply.

The first question you ask is whether it is necessary for persons who buy and sell metals, rags and other materials commonly known as junk outside of the City of Chicago, but have a building within the city where the same are sorted, are required to procure licenses as junk dealers. The ordinance contemplates that all such persons should take out licenses.

It is true that the accepted judicial interpretation of a "junk shop" is a place where junk is bought and sold.

City of Duluth v. Bloom, 55 Minn. 97.

Smith v. Ringold, 182 Mass. 308.

Charleston v. Goldsmith, 12 Rich. Law (S. C.) 470.

It is doubtful whether, even under this narrow definition, your clients would have a right to avoid the license fee, since they buy and sell junk even though their business transactions may be carried on elsewhere.

Our ordinance, however, seems to be designed to avoid any nice distinction as between persons who simply store or handle junk and those who buy and sell it. This is made manifest by examining sections 2249 and 2253 of The Chicago Code of 1911. The latter includes within the meaning of "junk shop" a shop "for the purchase, sale, barter, exchange or other dealing in or storage of rags or old rope, etc." Therefore, the City Collector is not bound to make inquiry as to whether the purchases and sales are made outside of the city or within the city. The license requirement applies in either event.

You next ask whether it is necessary for such parties to secure frontage consents from property owners in their vicinity for the purpose of building a structure to carry on the business. This is not necessary, since there is no provision in the ordinance requiring same.

The only limitation on the location of a junk shop or junk yard is contained in section 2267 of the Code, which prohibits the establishment of same within four hundred feet of any church, hospital, public or parochial school, and stipulates that the distance is to be measured by the shortest straight line between same and the junk shop or yard. Since you specify that the premises of your client do not come within this prohibition there is no reason why they can not use their property for such purpose.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

APRIL 10, 1912.

MR. H. H. EVANS, Sec'y, Committee on Local Transportation.

Dear Sir:

Your communication dated March 21, 1912, addressed to the Corporation Counsel, asking for advice as to what action the City Council may take to secure certain extensions has been referred to me for a reply.

You state that the Committee on Local Transportation has formally resolved to recommend to the council for passage ordinances for certain extensions by the Chicago Railways Company, which extensions are to be constructed as portions of the twelve miles allowable this year under section 3 of the ordinance of February 11, 1907, of the Chicago Railways Company; that frontage consents have been obtained and that the only thing which prevents the city from passing a valid ordinance for these extensions is the failure of the company to advertise its "Public Notice."

You also state that several communications have been addressed to the Chicago Railways Company asking that advertisement be made; that in addition to this, the members of the committee and the secretary have made repeated requests of officials of the company to advertise for the extensions and that no advertisement has as yet been made by the company. You, therefore, ask us to advise your committee what procedure can be taken to secure the construction of the extensions by the Chicago Railways Company.

Although you have not mentioned any extension in particular, yet we deem it best to take up one at a time. What we say in this communication, therefore, applies to the extension on "North Kedzie avenue from Elston avenue to Lawrence avenue and from Lawrence avenue to Foster avenue" *only*.

Section 3, Chapter 131a, page 2119, of Hurd's Revised Statutes of 1908, provides in part as follows:

"3, Location of road—consent—notice—damages.)

Section 3. No such company shall have the right to locate * * * its road upon or on any street * * * without the consent of the corporate authorities of such city, town or village. * * * Such consent may be granted for any period not longer than twenty years on

the petition of the company. * * * Provided no such consent shall be granted unless at least *ten days'* public notice of the time and place of presenting such petition shall have first been given by publication in some newspaper published in the city or county where such road is to be constructed. * * *

We believe that under the above provision, it is the duty of the company and *not* of the city to give the "Public Notice" required by our statutes.

Before the company can be compelled to construct the extension in question, however, it is necessary that all things which are required to be done by the city under the ordinance of February 11, 1907, shall first have been performed, and section 3 of this ordinance distinctly provides that "*the company shall upon the order of the City Council* of the city construct and equip such additional extensions as may be required by the city. * * *

We do not think that a request of the Committee on Local Transportation or a request by the Chairman and the members of the committee or the secretary is sufficient compliance with section 3 of this ordinance, and before the company can be compelled to construct the extension, it will be necessary for the City Council of the city to *order* such extension.

We are attaching hereto drafts of such orders, which should formally be passed by the City Council. We have prepared two for the reason that there are two ordinances covering this extension on account of the fact that the frontage consents were in two batches.

Frontage consents having been filed and the city having complied with all the requirements, which it is bound to comply with, it will then be the duty of the company to construct the extension for the year 1912. There being no definite time specified in the ordinance when the company must begin the construction of this extension, the company will have fulfilled its ordinance requirements if the line is completed before the last day of the year 1912.

Respectfully submitted,

MAX M. KORSHAK,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

APRIL 10, 1912.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

Regarding the claim of Frank W. Derby for wages and the city's liability therefor, it appears from the attached communications that on February 8, 1911, Derby was suspended as clerk and from special service in the Bureau of Water pending consideration of charges against him.

The charges in brief contain accusations of making false reports to the bureau as to time engaged in work and charges of negligence and inefficiency.

On March 7, 1911, Derby tendered his resignation to the then Commissioner of Public Works to take effect at once, and in the communication asked that the charges against him be withdrawn. In a communication of the same date from the Commissioner of Public Works to the Civil Service Commission the Commissioner states as follows:

"The Deputy Commissioner and I have gone over Derby's case several times, and we believe we have been unusually lenient with him. I have, however, no strenuous objection to acceptance of his resignation, and to withdrawal of the charges against him provided such action would coincide with the judgment of your body."

On the same day the resignation of Derby was accepted by the Superintendent of Water, and in response to the letter from the Commissioner of Public Works the Civil Service Commission withdrew the charges.

There is nothing in the attached correspondence which even raises a presumption as to the untruth of the charges or the absence of dereliction on the part of Derby. From all that appears, Derby preferred to resign rather than meet the charges.

It may well have been that his superior officer considered that he had been sufficiently punished by suspension and that further discipline, after an investigation of charges by the Civil Service Commission, was unnecessary and therefore allowed him to resign after the infliction of the punishment of suspension.

Section 12 of the Civil Service Act gives the right to the

head of a department to suspend an employe for a period not exceeding thirty days.

I am of the opinion that nothing in this case places any liability upon the city to pay Mr. Derby for wages during the period of his suspension.

I return herewith all communications.

Very truly yours,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

APRIL 11, 1912.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

Your letter of February 21, 1912, addressed to the Corporation Counsel, in which you ask for an opinion in reference to the pending proceeding and warrant for the opening of California avenue from 36th street to the West Fork of the South Branch of the Chicago River, and the construction of a bridge over the West Fork of the Chicago River at California avenue, has been referred to me.

The question is raised as to whether the bridge in question can be built under the ordinance of November 9, 1896, or whether it will be necessary to proceed with a new ordinance and condemnation in accordance with Alderman Martin's order of January 23, 1911.

I note that on November 9, 1896, an ordinance was passed by the City Council providing for the opening of South California avenue from the north line of 36th street to the West Fork of the South Branch of the Chicago River, repealing all former ordinances, etc. (Page 1064 Council Proceedings of 1896-7.)

Dillon on Municipal Corporations, Vol. 2, Sec. 584, says: "Since a valid by-law never becomes obsolete it remains in force until repealed by the Legislature or the Corporation." An ordinance does not expire by lapse of time.

Ryce v. Osage, 88 Ia. 558.

Hutchins v. Durham, 118 N. C. 457.

It is equally true, however, that the dismissal of a petition in a condemnation proceeding abrogates the entire proceeding under the ordinance so that before the condemnation proceedings can be again taken up all the necessary preliminary steps required by statute must be taken and a new ordinance authorizing such condemnation must be passed.

In the attached correspondence I note a copy of the notification to the attorneys for the defendants relating to the dismissal of the case and the vacation of all orders in the condemnation suit for the opening of California avenue from 36th street to the West Fork of the South Branch of the Chicago River.

I also note the statement made by the Superintendent of Maps that no entry of the above motion to vacate has been found on any of the dockets in the office of the Clerk of the Superior Court, nor does the minute book of Judge Brentano, before whom this case came up, show any motion or entry to vacate.

Under these circumstances it seems that there has been no motion to dismiss the petition for condemnation instituted under authority of the ordinance of November 9, 1896. On the other hand, however, on July 13, 1905, judgment was rendered and assessment confirmed as to all property in the condemnation proceeding upon the condition that the City Council should appropriate a sufficient sum of money to build a bridge across the River at California avenue, and that if the appropriation were not made in the next Bill that the judgment should be vacated and the petition dismissed. In the following year, viz., on March 26, 1906, an appropriation of \$100,000 was made for a bridge at California avenue across the West Fork of the South Branch of the Chicago River. On March 18, 1907, the appropriation of \$100,000 for California avenue was repeated. On March 5, 1908, there was no appropriation. On March 8, 1909, there was an appropriation of \$10,000 for a California avenue bridge. On January 10, 1910, there was an appropriation of \$150,000 for new bridges at California avenue (West Fork and Drainage Canal) contingent upon a bond issue. On February 14, 1911, the same appropriation was also contingent upon the bond

issue, and on January 2, 1912, an appropriation of \$200,000 for California avenue bridges.

Under these circumstances it is my opinion the condition upon which the judgment of July 13, 1905, was rendered has been complied with. At any rate, the judgment of 1905 has not been vacated nor has the petition been dismissed. On the other hand, the City Council has repeatedly shown its intention to comply with the condition of the judgment of 1905 by appropriating money for California avenue bridges in every year except in 1908. As I understand, the Department of Public Works now stands ready to go forward with the construction of those bridges.

It is therefore my opinion that the judgment of 1905 is an absolute judgment upon the fulfillment of the condition named therein and that consequently a new ordinance and new condemnation proceedings for the opening of South California avenue from the north line of 36th street to the West Fork of the South Branch of the Chicago River are not necessary.

Respectfully submitted,

HOWARD F. BISHOP,

Assistant Attorney Board of Local Improvements.

Approved:

WM. H. SEXTON,

Corporation Counsel.

Approved:

PHILIP J. McKENNA,

Attorney for Board of Local Improvements.

APRIL 13, 1912.

TO THE BOARD OF EXAMINERS OF PLUMBERS.

Gentlemen:

We are in receipt of your communication of March 13th, in which you ask for an opinion in regard to the following questions which have arisen before your Board:

(1) Is the Board required under the law to allow an interpreter for a non-English speaking candidate for a plumber's license, or is the matter within the discretion of the Board, or is the allowing of an interpreter illegal?

(2) Must the candidate for a plumber's license be a native or naturalized citizen of the United States, or is that

matter discretionary with the Board, or is the permitting of an alien to take such an examination illegal?

We shall answer the foregoing questions in the reverse order in which they are put to this department because a proper solution of the first question will depend somewhat on the reply to the second.

The Fourteenth Amendment to the Constitution of the United States declares:

“Nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.”

In article II known as the Bill of Rights of the Constitution of Illinois similar provisions to those quoted are incorporated.

The general purpose and scope of these constitutional provisions were thus stated by Mr. Justice Field in delivering the opinion of the Supreme Court of the United States in *Barbier v. Connelly*, 113 U. S. 27, 31:

“The Fourteenth Amendment, in declaring that no state ‘shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws’ undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness, and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property or prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses.”

The right to follow any of the common occupations of life, are declared by Mr. Justice Bradley in the *Slaughter*

House cases, 111 U. S. 746, 762, to be an inalienable right and on page 765 that learned justice held that an abridgement of the right to follow a lawful occupation amounts to a deprivation (to a certain extent) of liberty.

In *Yicko v. Hopkins*, 118 U. S. 356, 369, the court says:

“The Fourteenth Amendment to the Constitution is not confined to the protection of *citizens*. It says: ‘nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.’ These provisions are universal in their application to all *persons* within the territorial jurisdiction without regard to any differences of race, or color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.”

While the foregoing constitutional inhibitions have always been construed so as to permit the passage of all laws restraining the absolute liberty of persons or classes of persons, and the regulation of trades, professions, or vocations, under the police power of the state for the protection of the health, safety and morals of the community and for the general welfare thereof, such laws have always been declared to contravene the Constitution of the United States and that of the state when the restraint is directed against a class of persons or class of occupations which bears no reasonable relation to the protection of the health, welfare and safety of the community.

Lawton v. Steele, 152 U. S. 133.

The Act under which your Board is constituted entitled, “An Act for the licensing of plumbers and to supervise and inspect plumbing,” approved June 1, 1897, in force July 1, 1897, has been held constitutional in *Douglas v. The People*, 225 Ill. 536.

The purpose of that Act is undoubtedly, as intimated by our Supreme Court, to protect the public against the evils resulting from the incapacity and ignorance of persons engaged in the plumbing business. It is within the scope of the Legislature to give such protection to the public by enacting a law which will serve that purpose.

The Act provides for a practical examination to accom-

plish that end and your Board is constituted to execute the law, not arbitrarily, but with the end in view to give the public the necessary protection against incompetent plumbers without regard to their nationality, race or religion.

The Act itself provides:

“Section 2. Any *person* desiring to engage in or work at the business of plumbing * * * shall make application to a Board of Examiners hereinafter provided for and shall * * * be compelled to pass such examination as to his qualifications as said Board may direct; said examination may be in whole or in part in writing and shall be of a *practical* and *elementary* character, but sufficiently strict to test the qualifications of the applicant.”

“Section 4. * * * Said Board shall examine said applicants as to their *practical knowledge of plumbing*, house draining and plumbing ventilation, and if satisfied of the *competency* of such applicants shall thereupon issue a certificate to such applicant authorizing him to engage in or work at the business of plumbing. * * *”

We are, therefore, of the opinion, that it is mandatory upon your Board to examine every person who properly applies for a plumber's license and accord to him, whether he be a citizen or foreigner of whatever race, color or religion, just and equal treatment in the conduct of such examination.

We come now to the question whether you are required to act through an interpreter for a non-English speaking applicant for a plumber's license.

Bearing in mind the purpose of the Act, as announced by our Supreme Court in the Douglas case, that it is for the protection of the public against incompetent plumbers, and that for its accomplishment the Act is so drawn as to require a practical test of an applicant's qualifications as a plumber, we believe that a construction of the Act which would make knowledge of the English language an element to be considered by the Board in determining an applicant's qualifications as a plumber would render the Act or the administration thereof obnoxious to the Constitution of the United States and that of the State of Illinois. Knowledge of the English language apparently can bear no reasonable relation to the skill or competency of persons engaged in the plumbing business.

Of course, your body must be satisfied by some means that the non-English speaking candidate for a plumber's license can pass the practical test made by you to determine the right of the applicant to a license, and to that end, you may exercise a reasonable discretion in the choice of an interpreter, but the law does not contemplate that non-English speaking persons shall be barred from pursuing the occupation of a plumber if they can satisfy your Board that they are competent to do so.

Nor do we believe that section 18 of the schedule of the Constitution of Illinois which provides:

“All laws of the State of Illinois, and all official writings, and the executive legislative judicial proceedings, shall be conducted, prescribed and published in no other than the English language”

prohibits or even discourages the conduct of an examination by your Board through an interpreter.

Such an examination even if it be in writing cannot be an *official* writing within the meaning of the foregoing provision of the Constitution. An official writing is that of an officer of the state. The questions propounded should be in English, but the answers thereto may be in any other language, for these answers are not *official* writings.

Nor does the fact that the examination may be an executive proceeding enjoin the conduct thereof through an interpreter.

The Constitution provides also that *judicial* proceedings shall be conducted in the English language and yet it has never been held that testimony cannot be offered through an interpreter or that depositions cannot be submitted in a foreign language and translated to the court and jury.

See *Christman v. Ray*, 42 Ill. App. 111.

Respectfully submitted,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

APRIL 16, 1912.

HON. RAY PALMER, City Electrician.

Dear Sir:

Your communication dated April 4, 1912, transmitting a copy of a letter addressed to John C. Murphy, Chief Engineer, Chicago Railways Company; also original and duplicate of letter signed by John C. Murphy, Chief Engineer, Chicago Railways Company, addressed to Mr. H. Leser (all of which are hereto attached) has been assigned to me for reply.

You ask whether the city should be required in each instance when it applies for permits for attaching cross-arms, pole-tops and stringing wires, to accept the provisions of such permits in view of the fact that the provisions applying to such matters are specifically stated in the contract ordinance of February 11, 1907.

The first condition of the permit is that no attachment should be made which will interfere with the trolley poles or attachments of the Chicago Railways Company.

Under the second permit requirement the Department of Electricity must agree to save the Chicago Railways Company harmless with reference to all damages which might result by reason of the said cross-arms and electric light wires.

Under the third permit requirement the City of Chicago must, at its own expense, make necessary changes occasioned in the event that the Chicago Railways Company move or change any of its poles.

The provisions of our ordinances relating to this subject are found on page 3130 of the council proceedings of February 11, 1907, and are as follows:

"JOINT USE WITH THE CITY.

The said city shall have the right, without the payment of any compensation therefor, during the life of this grant, to use the poles of the company to carry the signal, telephone, telegraph and electric light wires and lamps of the said city. The transmission wires of the said city for such purposes shall be placed on poles of the company, on that side of each street or way (where poles are located on both sides thereof) designated by the said Board of Supervising Engineers, without cost or expense to the company, but the company shall repair

and maintain its poles as one of the operating expenses of the said street railway system under this ordinance; provided, that the said city shall indemnify and save harmless the company against and from all damages, judgments, costs or expenses which the company may suffer by reason of any negligence of the said city in installing, maintaining or using its said wires and lamps upon said poles."

You will observe that the second condition which relates to saving the Railways Company harmless is included in this provision just set forth.

This ordinance, however, is silent with reference to the first provision of the permit requiring attachments of the city to be placed in such a manner as not to interfere with the attachments of the Railway Company and also with reference to the third provision of the permit under which the Department of Electricity agrees, at its own expense, to make necessary changes in case the Railways Company find it necessary in the future to change the poles upon which the attachments are placed.

Whether the first and third provisions of the permit are *implied* conditions which the city is obligated to fulfill, is a question which we do not think it necessary for us to pass upon in this opinion. Suffice it to say we do not see why your department or this department should be called upon at this time to interpret our ordinances in this respect. If the conditions are such that a court would construe them in *conflict* with the ordinance of February 11, 1907, then they have no place in the permits granted to the city. Furthermore, you could not, even if you desired to do so, bind the city with additional burdens not imposed upon it by the original contract ordinance of February 11, 1907, in accepting a permit containing conditions not contemplated in the ordinance. If, on the other hand, the conditions do *not* conflict with our contract ordinance, it is not necessary that they be embodied in permits for the reason that the recital of ordinance requirements in permits does not give any additional weight to such requirements.

It is our opinion that these permits to the city should be general and subject only to the "provisions, stipulations and

conditions of the ordinance of February 11, 1907," without specifying any of these provisions or conditions in detail.

Yours very truly,

MAX M. KORSHAK,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

APRIL 22, 1912.

HON. JOHN D. RILEY, Superintendent of Maps.

Dear Sir:

In reply to your communication of the 6th ult., inquiring whether the ordinance passed July 17, 1911, published in Council Proceedings, pages 965 to 966, is valid and effective, in view of the fact that you find from the descriptions of the property mentioned in said ordinance, that they do not constitute one contiguous area of land, there being an hyatus or strip of land as indicated on the plat attached to your communication, which apparently is not disconnected by the ordinance mentioned, we beg to state, that at the time we rendered the opinion published on page 965 of said Council Proceedings, there was submitted to this department plats of survey indicating that all of the property described in said ordinance is one contiguous area of land, that it lay within the City of Chicago upon the northern border and within the boundary thereof. This department at that time also caused an examination to be made of the maps in your department, but for some reason, we were unable to obtain sufficient information from your department to arrive at a proper conclusion regarding the subject matter hereof. An examination was thereupon made of the maps of the county map department and an official of that department assured us that all of the property described is one contiguous area of land.

However, if you are now assured that the conditions are as indicated in your communication and the plat thereto attached, viz: that that part of the territory apparently disconnected by the ordinance of July 17, 1911, described as follows:

“a part of the east half of the southeast fractional

quarter of Fractional Section 31, Township 41 north of the base line and Range 13 and bounded as follows: Commencing in the center of the northwestern plank road at a point 1 and 80/100ths chains west of the southeast corner of said Section 31, thence running west 9 and 62/100ths chains, thence north 5 and 20/100th chains, thence north 57 degrees east by right angles to the plank road 5 and 20/100ths chains, thence along the center of said road 9 and 63/100ths chains to the place of beginning, containing five acres, more or less, * * *

is, and was at the time of the passage of the ordinance, surrounded on all sides by territory of the City of Chicago, the City Council had no power or authority to disconnect it and all of said territory above described, together with that strip of land indicated on the plat attached to your communication in cross hatched lines, should be treated as part of the City of Chicago.

Municipal corporations are created by authority of the State Legislature. The extent of their territory as well as their powers are fixed by statute, and may not be increased or diminished except by authority of the Legislature.

Under an act entitled "An Act in relation to the disconnection of territory from Cities and Villages and to repeal An Act therein named," approved and in force May 10, 1901, the City Council is given power to disconnect territory whenever, among other things, the owners representing a majority of the area of land of any territory within the city being upon the border and within the boundary thereof not laid out into city or village lots or blocks, shall petition the City Council praying the disconnection of such territory therefrom. (See Chapter 24, Section 206, Hurd's Revised Statutes of 1909.)

The foregoing being the only authority under which the City Council has the right to disconnect territory, it must be apparent that if any of the property sought to be disconnected is not upon the border of the city, its Council has no power to disconnect it.

In *Gilbert v. Morgan et al.*, 98 Ill. App. 281, the court construed the Act in question and held on page 284 as follows:

"We do not think the provisions of the statute are intended to be restricted so as to benefit owners of those several tracts of land which actually touch the border of the corporation, but rather that it is intended to include,

any territory composed of contiguous tracts, a portion of which touches the border, although the several parts of it may be owned by different owners.”

In *People v. Maxon*, 139 Ill. 306, the Village of Colfax on October 17, 1882, attempted to pass an ordinance disconnecting certain territory which had formerly been within its boundaries. The ordinance received a majority of the votes of the members of the Board of Trustees present, but not a majority of all of the members elect, which is requisite under the statute. The ordinance, therefore, was never legally passed. It was, however, published, and recognized as valid by the officers of the village and the officers of the township in which the territory lay. The latter took charge of it, levied taxes upon it, worked the roads, built a bridge within it costing \$6,000, and from the time such disconnecting ordinance was published the territory so attempted to be disconnected was recognized and treated by both village and township as not being a part of the village, until the 5th day of August, 1889, when the president and board of trustees of the village passed an ordinance levying a tax upon the real and personal property within the territory attempted to be disconnected.

The court held, in the foregoing case, that the facts indicated estopped the village from denying the validity of said ordinance.

Although we are of the opinion that the Maxon case, cited, is not similar to the case presented by the facts in relation to the disconnection of the territory referred to in your communication, we believe that it would be well to avoid the question of estoppel, and to that end, the City Council should pass a resolution and give notice to the owners of that part of the territory described as not being lawfully disconnected, that it is and will be treated, by the City of Chicago, as part thereof.

Respectfully submitted,
JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

APRIL 22, 1912.

TO THE HONORABLE THE CITY COUNCIL OF THE CITY OF CHICAGO.

Gentlemen:

On the 4th day of April, 1912, your Honorable Body passed the following order:

“That the Corporation Counsel be and he is hereby directed to prepare and submit at the next meeting of this Council an ordinance forbidding the scalping of tickets of admission to baseball parks and also furnish an opinion as to the validity of such ordinance.”

Right at the threshold I wish to call your attention to the fact that there is now pending and ready for passage by your Honorable Body an ordinance which amends the application to be made in the future by persons seeking licenses for entertainments of the first class, known in The Chicago Code of 1911 as theatricals.

In addition to this amendment another ordinance has also been introduced by the Committee on License which amends Section 2030 of the Code, so as to include within its prohibitions persons who attempt to sell theater tickets on any public street or place, or in front of any theater.

Both of these ordinances will be found on page 3308 of the current council proceedings.

If it is intended, as I assume it is, that tickets of admission to baseball parks be included within the scope of these ordinances, I would suggest that before their passage they be amended in accordance with the drafts herewith transmitted to your Honorable Body.

The existing ordinance of the city regulating and taxing places of amusement has been upheld by the Supreme Court of the State of Illinois as a valid exercise of the power of the City Council:

“To license, tax, regulate, suppress and prohibit hawkers, peddlers, pawnbrokers, keepers of ordinaries, theatricals and other exhibitions, shows and amusement, and to revoke such license at pleasure.”

The only limitation found in the Constitution upon the power of the legislature to tax occupations is, that the tax shall be uniform as to the class upon which it operates. Sec-

tion 1 of article 9 of the constitution expressly confers upon the legislature the power to tax "showmen."

By the Cities and Villages Act the legislature has delegated this power to municipalities, as above.

While you may not classify the different subjects of taxation arbitrarily you are permitted to exercise great freedom of discretion, even though it result in ill advised, unequal and oppressive legislation.

The classification for entertainments of the first class under the existing ordinances is based upon a difference in the charge of admission.

Baseball, which is in the tenth class, may be regulated and taxed upon a difference in the seating capacity of the place in which it is carried on.

Should opposition develop among the owners or managers of baseball parks to the amended form of application, I would suggest that you proceed to amend Section 110 of the Code, 10th class, by increasing the annual license tax.

The Century Dictionary defines a "scalper" as "one who sells at less than official or recognized rates; specially, a dealer in railway and other tickets who shares his commission with his customer, or who purchases unused tickets and coupons at cheap rates, and sells them at a slight advance, but for less than the official price; a ticket broker."

The Chicago Code of 1911 defines a broker as "one who is engaged, for others, in negotiating contracts relative to property with the custody of which he has no concern."

In a recent case our Supreme Court has held that stock brokers are not included in this ordinance, because they invariably have in their possession the certificates of stock owned by their clients. (*Hately v. Kiser*, 253 Ill. 288.)

From the information in my possession I take it that the prevailing conditions in the baseball world do not fit the above definitions for the reason that the scalper has the tickets he wishes to sell in his possession and he does not sell for less but for more than the official rates.

For this reason an amendment to Section 2030 of the Code is herewith transmitted for your consideration.

Very truly yours,

NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

APRIL 22, 1912.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Your letter asking to be advised as to the authority of the city over the shipping from the Chicago harbor in regard to rules and regulations for the protection of the lives of passengers and its authority to enforce the regulations of the Federal government concerning same, was referred to me for reply.

The city has general police powers over the waters constituting the harbor except insofar as such powers have been delegated to the general government. This includes the right to control and regulate anchorage, docks, wharves and all public landing places. It does not, however, include the management and control of the boats which is exclusively within the jurisdiction of the Federal government. It is doubtful whether the city can even legislate against overcrowding. Its authority is limited to prosecuting under the Federal statutes and in the Federal courts.

Under the title of "Steam Vessels" the statutes of the United States make complete provision for regulation, inspection, equipment and punishment of offenders, for all steam water craft. Under section 4400 of these statutes "all steam vessels navigating any waters of the United States which are common highways of commerce, or open to general or competitive navigation, excepting public vessels of the United States, vessels of other countries and boats propelled in whole or in part by steam for navigating canals" are subject to the provisions prescribed under that title.

Such being the case, it would be futile to pass any ordinance intended for the protection of the lives of passengers

or to attempt to do more than to start prosecutions in case there are any violations of the statutes by the owners of boats.

Since the power of the city is so limited, I have prepared, in accordance with your suggestion, as an alternative to an ordinance, a resolution embodying the suggestion of needed changes in the rules and regulations governing passenger boats to the Department of Commerce and Labor, which has control of interstate commerce and the carrying of passengers on the public waters. I submit herewith a draft of said resolution.

Yours respectfully,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

APRIL 22, 1912.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

We are in receipt of your communication of the 17th instant, requesting an opinion as to whether it is necessary for a hotel to have a dram shop license for each bar it operates, including so-called service bars.

Section 1527 of The Chicago Code of 1911 provides, among other things, that no license shall be issued for the keeping of any saloon or dram shop, where more than one room is to be used, unless all the rooms which it is intended to use are directly connected, adjacent and contiguous with and to each other, and upon the same floor, and that every license issued for a saloon or dram shop shall describe and define with certainty the room or rooms in which such saloon or dram shop is to be conducted or maintained.

The said section then proceeds as follows:

“No person licensed to keep a saloon or dram shop shall be permitted to sell, give away or otherwise dispose of any intoxicating liquor of any kind whatsoever at any place other than the place specifically described in his license, whether such place be in the same build-

ing or not; provided, nothing herein contained shall be so construed as to prevent any hotel from serving intoxicating or spirituous liquors of all kinds to its guests, on any floor of, or in any part of, such hotel, if such liquors so served shall be kept in and only served from a licensed bar or dram shop located in and conducted by said hotel. The foregoing provision shall apply only to hotels conducted and maintained as such."

We are of the opinion that a hotel is required to take out a separate license for each bar conducted by it, whether main bar or service bar, unless such bars are located and conducted in a room or rooms specifically described in the license and directly connected, adjacent and contiguous with and to each other and upon the same floor.

Yours respectfully,

BRYAN Y. CRAIG,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

CHICAGO, APRIL 22, 1912.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF CHICAGO.

Gentlemen:

In response to the request of your Honorable Body I herewith beg to submit the opinion of this department as to the power of the City Council of the City of Chicago to enforce a universal transfer ordinance over the lines of the various elevated railroads in the city, under the present general ordinance provisions of the city, and also as to the power of the City Council of the City of Chicago to pass further ordinances requiring universal transfers to be given and accepted by such various lines of elevated railroad. The inquiry arises with special reference to the reported consolidation of the various elevated lines in the City of Chicago, which so-called consolidation of interests has been in effect for about a year last past.

In order to reach a legal conclusion with respect to the proposition submitted, it will be necessary, at the outset,

to consider the nature and characteristics of the elevated railroad systems, their charter powers, as well as those with which they are invested by various ordinances from the city and the powers and rights inherent in the municipality, flowing either from the contract ordinances themselves or from the city's organic law.

All of the elevated railroad companies heretofore constructed and now being maintained and operated within the corporate limits of the City of Chicago are corporations organized under the general Railroad and Warehouse Act of the State of Illinois as commercial railroad corporations. None of them owe their existence to special charters. They, therefore, are invested with all the privileges, rights and immunities of ordinary railroad corporations and are subject to all the duties and obligations of such corporations to the public at large, to the city and to the state.

Lieberman v. C. & S. S. Rapid Transit Co., 141 Ill. 140;

Knopf v. Lake Street Elevated R. R. Co., 197 Ill. 212.

While the different elevated railroad companies are commercial railroads with respect to their corporate organization and in their operation, they are in effect street railways in so far as their operation is confined within the corporate limits. All of the loop line, the line of the Chicago & Oak Park Elevated Railroad Company and considerable portions of the other lines are constructed and operated upon public streets, and, in so far as their lines are placed along and upon public streets for practical purposes, they may be considered street or operated upon public streets, except at crossings, these companies perform essentially the functions of street railway companies. They have been so considered as street railways in the following cases:

Doane v. Lake Street Elevated Railroad Co., 165 Ill. 510;

Bond v. Pennsylvania Railroad Co., 171 Ill. 508.

In the later case of *Barsaloux v. City of Chicago*, in discussing the question of whether the fund resulting from the traction ordinances of 1907 could be appropriated for pre-

liminary plans for a system of subways, the Supreme Court of this state decided that any system of railways or railroads for the transportation of urban traffic, whether on, above or below the streets, was a system of street railways.

In the Bond case, *supra*, it is said:

“Both parties refer to comment upon *Doane v. Lake Street Elevated Railroad Co.*, 165 Ill. 510, and other cases of similar character, but in that case it was pointed out that there was no distinction between surface and elevated street railroads, when the railroads there in question were regarded as street railroads constructed and operated for the public convenience and facilitating travel on such streets.”

As far as the control of the service of the elevated railroads by the city is concerned, the Supreme Court would, in our opinion, hold that the city, has all the powers over these railroads which it has over commercial railroads within the city, and in addition to these powers, all the powers which the city has over street railways. All railroads, whether street railways or commercial railroads, are affected with a public interest. They are not private, but public or quasi-public enterprises and over such enterprises or business, it is well settled that the state has the fullest measure of control. The state may regulate the service rendered to the public by such corporations, it may fix their compensation, prevent discrimination between individuals and between localities, and in general may insist that each of such companies shall, as far as their facilities permit give the utmost public service and that they shall not adopt business policies inconsistent with such public service.

The power which the state has with reference to street railroads or commercial railroads wholly within the limits of a municipality, it may delegate to the city, but such powers as are not delegated to the city are retained by the state.

In addition to the powers of control over such corporations which the state may grant to a city, the city has the further power of control such as it has reserved to itself under the terms of the grants and licenses to such companies. Whatever power over the service of the elevated railroads the city claims a right to exercise must, therefore, be found either

by virtue of a direct delegation of such power to the city by the Legislature or by virtue of the permits, licenses and rights which have been granted by the city to such companies and accepted by them.

There have been heretofore adopted four separate ordinances which gave to each grantee the right to construct, maintain and operate one side of the loop. The first ordinance to the Lake Street Elevated Railroad Company to construct, maintain and operate that part of the loop which is situated on Lake street, was passed October 1, 1894, and provides, *inter alia*, that "the company shall cause its trains to be regularly and systematically run at such intervals as shall be necessary to accommodate the public, and the number of all such trains and the frequency with which they are moved shall be increased as the demands of the public shall render necessary, and the increase of traffic warrant."

The second loop ordinance was granted to the Northwestern Elevated Railroad Company June 24, 1895, amending the original ordinance to said company passed June 8, 1894, and giving authority to the grantee to construct and operate that part of the loop on Fifth avenue and providing that the Fifth avenue side of the loop should be subject to the joint use of the Northwestern, Lake Street, Metropolitan, South Side and Union Elevated Companies "under any and all contracts now existing or which may hereafter be entered into between the same companies or any of them." The ordinance contained the same provisions as to the regular and systematic movement of trains for the accommodation of the public and that the increase in the number of trains should be carried on as rapidly as the demands of the public rendered necessary.

The Wabash avenue side of the loop was constructed under an ordinance to the Union Elevated Railroad Company passed October 14, 1895, which provided that the tracks should be for the joint use of all the before mentioned companies "upon such terms and conditions as have been agreed upon under any and all contracts now existing between the said corporations or such contract or contracts as may hereafter be entered into * * * for the use and operation of the said

railroad hereby authorized." The ordinance contained similar provisions with reference to the accommodation of the public and the number of trains as are found in the previous ordinances.

The Van Buren street side of the loop was constructed under an ordinance to the Union Consolidated Elevated Railroad Company of June 29, 1896, providing that the structure should be subject to the joint use of the other elevated railroad companies, "upon such terms and conditions as may have been agreed upon in any and all contracts now existing * * * or such contract or contracts as may hereafter be entered into by the said companies or any of them for the use of said railroad."

These ordinances have been supplemented from time to time by various other grants to the respective companies, the most important of which are the Ravenswood extension ordinance, the Englewood extension ordinance and the permit allowing the Northwestern Elevated Railroad trains to descend to the surface level and run along the tracks of the old Chicago & Evanston Railroad Company.

All the ordinances, including the loop ordinances, designated a five-cent fare for a continuous ride upon any of the respective lines of railroad. The Northwestern Elevated Railroad Company has acquired the loop property and various sub-terminals have been established by the respective companies, notably at North River street, Congress street and Franklin street.

It is not entirely clear from the original loop ordinances whether the respective parties to these contracts regarded the loop as a terminal or as a connection between the lines of different elevated railroad companies, but there is nothing sufficiently specific in any of the ordinance provisions to make certain any determination that the loop was ever intended to be more than a general terminal for the different lines of elevated railroad using the same.

The plenary control of the city over the public streets is not subject to dispute. It has been given to the city in express terms by the Legislature by Section 1, Article V, Cities and Villages Act, clauses 23, 24, 25, 28, 29, 66, 72, 89,

90, 96 and 97. The city has also, under the organic act, the power to regulate the business of street railway companies and prescribe their compensation.

Clause 42, Section 1, *supra*, provides:

“To license, tax and regulate hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen, and all others pursuing like occupations and to prescribe their compensation.”

It has been expressly held by the Supreme Court that this clause gives the city the power to license, tax and *regulate* street car companies.

Chicago Union Traction Co. v. City of Chicago, 199 Ill. 484.

We now come to the so-called consolidation of the various elevated railroad companies and the extent to which this consolidation has been carried, the form under which it now exists, if at all, and the position in which the consolidation has left the elevated railroad corporations.

In the summer of 1911 wide newspaper publicity was given to the alleged fact that there had been a consolidation of the various elevated railroad companies in the city under the designation of “Chicago Elevated Railways,” which consolidation was said to be a corporation existing under the laws of Massachusetts, and which was said to own and control the various systems of elevated railroads in the City of Chicago. The facts in this respect, so far as it has been possible to obtain them from the officers of the various companies, and other sources, are that during the summer of 1911 Henry A. Blair offered to purchase shares of stock of the three elevated railroad companies known as the Northwestern Elevated Railroad Company, South Side Elevated Railroad Company and the Metropolitan West Side Elevated Railway Company. In response to the offer approximately ninety-eight per cent. of the capital stock of each of the three companies was sold to Mr. Blair, and has since been transferred by him to three individual trustees (of whom he is one) appointed under and in pursuance of an instrument dated June 30, 1911, whereby the acquired shares of stock have been pledged to secure notes amounting to thirty million dollars,

executed by the trustees, F. A. Vanderlip, Samuel McRoberts and Henry A. Blair. Subject to this pledge of shares of stock, these trustees have also issued to the beneficiaries under the trust instruments, certificates of interest called shares and these shares have been sold and distributed by the trustees.

This form of organization is not a form of incorporation but is commonly known as the "Massachusetts Trust Plan," and is a name adopted for convenience as the authorized designation for business purposes of the trustees. No one corporation controls the stock of any of the elevated roads, nor does any of the elevated railroad corporations own or control the stock of either of the others. A somewhat fictitious separate legal and corporate entity of each elevated railroad corporation is kept up and maintained and each railroad company mentioned is being operated under and through a board of directors and officers elected or appointed by such board or boards and perhaps technically, at least, each elevated railroad is independent of the others.

For the sake of promoting harmony in the administration and operation of the several respective elevated railroads, as well as for the reason of economy in the reduction of operating expenses, the various boards of directors of the respective companies have, in some instances, selected the same persons as officers, and a single manager, it is believed, supervises and directs the operation of the physical properties. The directorates and organizations have been retained in separate form constituting "dummy" corporations whose policies are directed and whose management is controlled by the three trustees.

In view of the necessity for refunding a large part of the bonded debt of the Northwestern Elevated Railroad Company and for the purpose of reducing operating expenses and unifying the control of the elevated systems, it was thought best by the stockholders to transfer practically all of their holdings to Henry A. Blair, who as above noted, was enabled by reason of his and his co-trustees' ownership of such shares, to negotiate a loan of thirty million dollars with the shares as collateral security.

It would be not within the scope of this opinion to give

even a detail of the agreement and declaration establishing the elevated railways' collateral trusteeship, which comprises a printed document of forty-six pages, but it is sufficient to say that the trustees under the agreement occupy the position as the owners of the stock of the various elevated railroad companies, subject, however, to trusts in favor of the holders of the securities. Without considering the effect of the trusteeship of the stock, we will assume for the purposes of this opinion that Blair and his associates held the stock unimpressed with any trust; are the absolute owners in fact.

Under Section 2171 of The Chicago Code of 1911 it is provided:

“And at any point where any line of any street railway owned, leased or operated by any person or corporation does now or shall hereafter, within the city, join, connect with, cross, intersect or come within a distance of two hundred feet of any other line of street railway owned, leased or operated by the same person or corporation, any passenger who shall have paid his fare on any street car or other vehicle run or operated on such first mentioned line shall be entitled to demand and receive from the person or persons in charge of such street car or other vehicle upon which he has so paid his fare, a transfer ticket, which transfer ticket shall entitle such passenger, without further charge, to be carried on any other one line adjoining, connecting, crossing and intersecting, as aforesaid, and owned, leased or operated by such person or corporation, for a continuous trip of any distance within the city if used within one hour after the same is issued, at the point or place for which such transfer ticket was issued. Any person or corporation owning, leasing, running or operating street cars or other vehicles for the conveyance of passengers, on any street railway within the limits of the city, by virtue of any assignment, transfer, sale, lease or operating agreement to such person or corporation from another person or corporation, of rights, privileges or franchises, granted and acquired by or vested in such person or corporation, pursuant to authority granted for that purpose by any statute of the State of Illinois, or by any ordinance of the city, shall be under the same obligation to issue transfer tickets to, and receive and honor transfer tickets from, passengers as such grantor or lessor would be under obligation to issue, receive and honor under the foregoing provisions of this section, if such grantor or lessor were operating

street cars or other vehicles for the conveyance of passengers by virtue of such statute or ordinance without having so assigned the same and every such lessor or grantor shall in all respects as to the obligation to issue, receive and honor transfer tickets be in the same position as if such grant, sale, lease or agreement had not been made; provided, however, that nothing herein contained shall be construed as superseding or repealing any of the provisions contained in the respective ordinances under which corporations are now or may be hereafter operating street railroads within the City of Chicago."

This provision is penal in its character and will, according to the well regulated canons of interpretation, be strictly construed by the courts.

While there may be a question as to whether any line of elevated railroad running into the loop is owned, leased or operated by another line of elevated railroad so that one company under this ordinance could be compelled to issue a transfer to a passenger desiring to ride over the lines of the other company, and whether said other company could be compelled to accept such transfer for the transportation of such passenger, yet an ordinance could be framed which would require the roads controlled by the same persons or by a syndicate to furnish and receive transfers. There has been in the strictest legal sense, possibly no assignment, transfer, sale or lease by any one of the elevated railroad companies to *any other of the elevated railroad companies* using the loop. What has been done is that one individual, Blair, has acquired ninety-eight per cent. of the stock of three companies and has borrowed money on it for the benefit of the companies.

In the case of *Chicago Union Traction Co. v. City of Chicago*, 199 Ill. 579, it was held that the Union Traction Company and the Consolidated Traction Company must exchange transfers, although the legal ownership of each company was in a separate corporation. The decision on this point was based upon the ground that two corporations were, *in fact*, owned and controlled by the same interests, although a different and distinct "paper" ownership was claimed by both companies and the court laid down the general proposition that in performing the duty of a public utility company to

the public, the *substance of things* and not *legal entities* would be considered.

The court said (page 632) :

“The requirement embodied in Section 1723 is imposed upon the street railroad companies therein specified by reason of their public character, and by reason of the fact that they are engaged in a public occupation which permits them to use the streets and highways of the people. The duty to give the transfer tickets, therein required, is a duty which arises out of the public character of their business. This duty rests not merely upon the technical owner, but upon the real, beneficial owner, and, in this case, it cannot be doubted that the Chicago Union Traction Company is the beneficial owner.

* * * Where the duty of a public service corporation to the public is to be determined, the substance of things will be looked to, and consideration should not be given to mere corporate fictions.”

Quoting from an opinion in a Texas case, which adopted the language of the New York Court of Appeals, the court also said (page 633) :

“We have of late refused to be always and utterly trammelled by the logic derived from corporate existence where it only serves to distort or hide the truth. This court has always refused to be controlled by technicalities when interposed to prevent an investigation into the real facts of a case. Courts will look beneath the masque of legal forms for the real facts of any transaction presented to them for investigation.”

Quoting from Lord Mansfield, in *Johnson v. Smith*, 2 Burr. 962, the court said (page 635) :

“It is a certain rule that a fiction of law shall never be contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted.”

The difference between the case above cited and the one under consideration is, that the Union Traction Company was leasing the properties of the Consolidated Traction Company and under the terms of the ordinance came within the purview of the language “any company leased by another” shall exchange transfers, while in the present instance the relation of lessor and lessee is absent, but a relationship exists among the companies by reason of a syndicate control of all the

properties such as to merge all direction and management in the trustees' hands.

While the question is not without doubt, we are inclined to the belief that a court would hold that the real beneficial owner of the different elevated railroad systems hereinabove enumerated, is the board of trustees of the voting trust, which is directing, conducting, managing and operating these systems through their appointees. It is true that these appointees may be directly appointed or elected by the different corporations, but of course the dictating control in the matter of the selection of such subordinate functionaries, rests in the hands of the syndicate.

The semblance of separate corporate existence maintained by the corporations and the employment of the corporate fiction of individual management and control, would be cut through by a court's decision, and the vital question laid open for inspection as to whether the syndicate is the real beneficial owner and the several corporations the mere technical owners.

It seems, in accordance with a sound rule of public policy, that these corporations should not be allowed to defeat a demand for betterment in their service to the public by a subterfuge and concealment behind a cloud of legal technicalities invented probably for the very purpose of defeating any demand for a universal transfer system.

We have prepared and transmit herewith an ordinance amending Section 2171 of The Chicago Code of 1911, which, in our opinion, will extend the existing requirements for universal transfers over this new operation of elevated roads.

Respectfully submitted,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

APRIL 22, 1912.

HON. JOHN McWEENY, General Superintendent of Police.

Dear Sir:

The Assistant General Superintendent of Police made a verbal request of this department for an opinion regarding the necessity of a license fee for *bona fide* athletic clubs giving athletic exhibitions, including wrestling matches, where members and their guests pay an admission fee.

The question arose recently when the Chicago Athletic Association gave such a wrestling match. There was an admission fee charged, but the admission was supposed to be for members and their friends only. Each member had the privilege of bringing a limited number of guests.

Section 107 of The Chicago Code of 1911 says that no person or corporation "shall give, conduct, produce, present or offer for gain or profit" any of the entertainments classified in the preceding section without a license issued for that purpose.

Section 108 provides for application for a license and uses practically the same wording as the preceding section in defining those who must apply for a license.

Section 106 is more comprehensive than the other two sections in defining what classes of amusements shall be licensed, the wording in that case being that all amusements "offered, operated, presented or exhibited for gain, or for admission to which the public is required to pay a fee," are divided into twenty-one classes for purposes of license and for other regulative provisions.

Inasmuch as the three sections must be construed so as to harmonize it follows that we must be guided by the fuller expression in Section 106 rather than the words in the other sections.

It will be noted that the ordinance makes two general classes of amusements which require licenses. One of these classes comprises all amusements operated as a business where the owners seek a profit on the enterprise. Evidently, however, the City Council intended that the exaction of a license fee was not to be limited to such enterprises, and it therefore added another class of amusements on which such fees are required, including within the second class all amuse-

ments for admission to which the public is required to pay a fee.

It may be claimed that the public is not admitted to the exhibitions in question. But this contention is hardly tenable, since members may bring guests. If a member may bring one guest then there is nothing to prevent his bringing a dozen if the rules of the club allow it, and this sort of exhibition may be turned into a business and promoted in the form of a club instead of as a regular amusement enterprise. Such things have been done in the past for the purpose of evading laws which suppress gambling, sparring exhibitions, the sale of liquor, and other prohibited pursuits.

The law frowns on any evasion of the statutes or ordinances through the instrumentality of a club. It has been held that a social club has no right to dispense liquor to members at actual cost and expense of serving without a license.

People v. Law and Order Club, 203 Ill. 127.

The rule laid down in the case of clubs selling liquor applies in the present instance.

While it is true that in the particular case which gave rise to the inquiry the club in question was beyond suspicion so far as its good faith in giving the exhibition is concerned, and that there are other athletic clubs of like high character there is no doubt that a general ruling which will apply in their case would apply frequently in the case of clubs of unsavory reputation.

It was probably to avoid the result, which would inevitably follow, of opening the way to an abuse of the privilege of holding exhibitions and promoting amusements of all kinds without licenses, on the pretense that the same are not operated for gain, that the ordinance was made so broad as to include exhibitions of this kind as among those for which it is necessary to take out licenses. Therefore, it becomes the duty of the license officers to require these clubs to take out licenses for such wrestling matches.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

APRIL 25, 1912.

WM. D. CASSIDY, Esq., Clerk of Municipal Pension Fund.

Dear Sir:

We are in receipt of your communication of March 12th in which you request an opinion from this department upon the following questions:

First. Is an employe who had obtained leave of absence prior to or on the day the act became effective (July 1, 1911) to accept a position in another department (not under Civil Service) entitled to the benefits of the act?

Second. Can such employe pay into the treasury the stated amount of \$2.00 a month and thereby retain his standing in the original department; and if so, must the payments be made each month or may more than one month's dues be paid at a time?

Third. In cases where persons are employed only for a portion of the year, by reason of lack of work, can payments be made covering more than one month's dues or must payments be made each current month during the "lay-off?"

Section 1 of an Act entitled, "An Act to provide for the formation and disbursement of a pension fund * * * for municipal employes appointed to their positions under and by virtue of an Act entitled, 'An Act to regulate the civil service of cities,' etc.," approved May 31, 1911, is in part as follows:

"That hereafter in cities, villages and incorporated towns having a population exceeding 100,000 inhabitants, there shall be created, established and maintained a pension fund for municipal employes who are employed in such cities, villages and towns, under and by virtue of an Act entitled, 'An Act to regulate the civil service of cities,' approved and in force March 20, 1895, and for those who were appointed prior to the passage of said Act *and who are now in the service of such city, village or town:* * * *

Said fund shall consist of amounts of two dollars a month retained or deducted by the comptroller of such city, village or town from the salaries or wages of each employe and such other sums as are hereinafter referred to: Provided, however, that if the name of any such employe shall not appear upon the pay roll of the department in which he or she is employed by reason

of leave of absence, sickness, lack of work, or any other good and sufficient cause, making a deduction impossible such employe may retain his or her rights under this act by paying two dollars *each* month to the treasurer of such city, village or town for the benefit of said fund, during his or her temporary absence from the service."

Does the Act contemplate that only such persons who at the time it became effective were in the *actual* service of the city, should be entitled to the benefits thereof?

In view of the provision made in Section 1 above quoted, that if the name of any employe shall not appear upon the pay roll of the department in which he or she is employed, by reason of leave of absence, etc., making a deduction of the amount of \$2.00 a month by the comptroller impossible, such employe may retain his or her rights under the act by paying \$2.00 each month to the treasurer of the city during his or her temporary absence from the service, we are of the opinion that the words, "who are *now* in the *service* of such city" are not limited in meaning so as to include only those who are in the *actual* service of such city, but are intended to and do apply to all persons who are *entitled* to their positions under the Civil Service Law.

The second and third propositions submitted to us present one and the same question.

The language of the act providing for the payment of \$2.00 to the treasurer of the city, in the event of temporary absence from the service, by reason of leave of absence, sickness, the lack of work, or any other good and sufficient cause, standing alone, is clear and unambiguous. The act provides that such employe may retain his or her rights under said act by paying \$2.00 *each* month to the treasurer.

But a careful examination of the entire act renders the above otherwise unambiguous language rather dubious in its application.

The conditions under which employes mentioned in said act are entitled to become beneficiaries thereunder and receive the benefits provided, are all contained in Sections 7, 8 and 9 of the act, which are as follows:

"§7. Any employe who shall have been in the *service* of such city, village or town for a period of not less

than twenty years, and who shall have attained the age of fifty-five (55) years, shall have the right to retire from the service of such city, village or town at any time after this act is in force and effect; and to become beneficiary hereunder at any time subsequent to five (5) years from and after the date when this act is in force and effect: Provided, such employe shall in the event that he or she shall retire from the service of such city, village or town within said five (5) years period pay into said fund the sum of two dollars (\$2.00) per month until he or she shall become a beneficiary hereunder: And, provided, further, that any such employe who shall retire from the service of such city, village or town before deduction shall have been made from the salary or wages of such employe for a period of twenty (20) years shall agree to pay into said fund within three (3) years from and after the date when such employe shall become a beneficiary of said fund, the sum which, together with all moneys previously deducted from the salary or wages of such employe, is equal to the full amount which would have been deducted and applied to said fund during a period of twenty years, and interest thereon at the rate of five per cent. (5%) per annum. Such sum so to be paid shall be deducted by the treasurer of such city, village or town in equal monthly installments from the benefits due and payable to such employe at the regular times for the payment of said benefits after he or she shall become a beneficiary hereunder.

"§8. Any employe who has been in the service of such city, village or town for a period of not less than twenty (20) years, and who shall retire from the service of such city, village or town before attaining the age of fifty-five (55) years shall have the right to continue paying into said fund *monthly*, at the prescribed rate, and may thereby remain in good standing in said fund and shall have the right to become a beneficiary hereunder upon attaining the age of fifty-five (55) years, not, however, until five (5) years from and after the date when this act is in force and effect: Provided, such employe shall in the event that he or she retires from the service of such city, village or town before deduction shall have been made from the salary or wages of such employe for a period of twenty (20) years, pay into such fund within thirty (30) days from the date when he or she shall retire from the service of said city, village or town, a sum which, together with all the moneys previously deducted from the salary or wages of such employe is equal to the

full amount which would have been deducted and applied to said fund during a period of twenty (20) years."

"§9. Any employe who has been in the service of said city, village or town for a period of five (5) years or more, from and after the date when this act is in force and effect, shall have the right to retire from the service on account of serious disability rendering him or her unable to properly discharge his or her duties and may become a beneficiary under this act and be entitled to receive the full benefits for a period of not more than two (2) years, which period may be extended upon proof satisfactory to said board of continued disability. Proof of disability shall be furnished by the commissioner of health and by at least one practicing physician of such city, village or town."

Bearing in mind that the term "service" wherever it is used in the foregoing sections, does not mean *actual* service, but rather the holding of a position under the Civil Service Law, we conclude that both the time of such service and the payment of a sum of money which is equal to at least the sum total arrived at by multiplying the sum of \$2.00 by the number of months of service required by the act in each case, are essential conditions prerequisite to entitle any person to its benefits.

Suppose a case of an employe who had attained the age of fifty-five (55) years and had been in the service of the city for a period of not less than twenty (20) years, but on account of leave of absence or lack of work, he actually served only nine (9) months of each year. Suppose, further, that such employe had not paid to the treasurer the sum of \$2.00 each month during his temporary absence from the service, as provided in Section 1 of the act, so as to entitle him to retain his rights thereunder.

Would his rights under the act be lost, so that upon his return to *actual* service each year he could not claim the benefits thereof?

It must be remembered that Section 1 of the act provides that the pension fund shall consist of \$2.00 a month retained or deducted by the comptroller of the city from the salary or wages of each employe. We believe that such deductions are compulsory; and it certainly could not have been con-

templated that an employe should be burdened with the assessment but deprived of the benefits of the fund.

We are therefore of the opinion that upon the return of an employe to *actual* service he is immediately reinstated to the benefits of the act even though he fails to make payments during his temporary absence.

But even if an employe is reinstated to the benefits of the act, in the case supposed, does he forfeit his right to claim the benefit of all deductions made from his salary or wages prior to his default in the payments during temporary absence, in computing whether he is entitled to a pension upon retirement after twenty (20) years of service and attaining the age of fifty-five (55) years?

That part of Section 1 of the act which relates to the manner in which an employe may retain his rights during temporary absence provides no penalty for default in the payment of \$2.00 each month, unless it can be said that a provision for keeping a right in force impliedly terminates the right for non-compliance. This may be conceded, and yet it does not necessarily follow that upon reinstatement to his rights under the act by returning to *actual* service, an employe may not have the benefit of the deductions and payments made during his incumbency under the Civil Service Law. For it is provided in Section 7 above quoted, that any employe who shall retire from the service of the city before deductions shall have been made from the salary or wages of such employe for a period of twenty (20) years, shall agree to pay into the fund within three (3) years from and after the date when such employe shall become a beneficiary of said fund the sum, which together with all moneys previously deducted from the salary or wages of such employe is equal to the full amount which would have been deducted and applied to said fund during a period of twenty (20) years and interest thereon at the rate of 5 per cent. per annum.

It will be seen, therefore, that it would make no difference whether the employe in the case supposed paid the sum of \$2.00 each current month during his temporary absence, or paid said sums together with the interest provided for after he became a beneficiary of the fund.

But the foregoing conclusion could not be made in a case where an employe retired after twenty (20) years service before attaining the age of fifty-five (55) years under Section 8 of the act.

It is provided there that such retired employe shall have the right to continue paying into the fund *monthly* at the prescribed rate and thereby remain in good standing in said fund and shall have the right to become a beneficiary under the act upon attaining the age of fifty-five (55) years.

As in the case first assumed the provision in Section 8 for continuing in good standing a retired employe necessarily implies that a default in the monthly payments shall determine his right to become a beneficiary under the act. However, a retired employe is no longer in the service of the city and unless he were reinstated under the Civil Service Law he could not be reinstated to the benefits of the Pension Act.

Moreover, the only provision in the act for the return of money deducted from the salary or wages of an employe during *actual* service and payments made during temporary absence, is contained in Section 4 which is as follows:

“§4. Said board shall have the power, and it shall be its duty, * * *

Sixth. To authorize the payment to any employe who may be separated from the service of such city, village or town by the abolishment of his or her position before such employe shall have qualified for a pension, an amount equal to the amount deducted from the salary or wages of such employe: Provided, that such employe shall release said board from all future liability upon receipt of said sum.”

It is a familiar canon of construction of statutes that the enumeration of classes of persons or subjects to which a provision is made applicable excludes all others.

St. Louis Coal Co. v. Miller, 236 Ill. 149, 152.

It follows that the determination of the rights of a retired employe for failure to make monthly payments, carries with it a forfeiture of all previous deductions and payments unless, as heretofore stated, such retired employe is reinstated to the service of the city under the Civil Service Law.

Likewise the resignation or discharge of an employe terminates his rights under the Pension Act and works a forfeiture of all previous deductions and payments.

Suppose, however, a case of an employe who had been in the service of the city for a period of five (5) years or more from and after the date when the act went into force and effect, but on account of leave of absence or lack of work, as in the case first supposed, he actually served only nine (9) months of each year, and had not paid to the treasurer the sum of \$2.00 each month during his temporary absence.

It is provided in Section 9 that any employe who has been in the service of the city for a period of five (5) years or more from and after the date when the act went into force and effect shall have the right to retire from the service on account of serious disability rendering him or her unable to properly discharge his or her duties and may become a beneficiary under this act and be entitled to receive the full benefits for a period of not more than two (2) years, etc.

It will be observed that no provision is there made, as in Section 7 of the act, for the payment of any sum of money after the employe becomes a beneficiary by virtue of that section, viz., upon disability after five (5) years of service. And yet it cannot be said that such employe has lost his rights to the benefits of the act unless he paid the sum of \$2.00 each month of his temporary absence from the service during the period of five (5) years, because of his reinstatement by the deduction of \$2.00 from his salary on his return to *actual* service as in the case first supposed.

We are therefore led to the conclusion that in the case last assumed the five (5) years' service means sixty (60) months of service, during each of which the sum of \$2.00 either has been deducted from his salary or paid by the employe to the treasurer.

The next question then arises as to whether it is permissible for an employe to pay and for the comptroller to deduct more than the sum of \$2.00 during any one month?

It is apparent from Section 1 that the fund created by the act consists of amounts of \$2.00 a month retained or deducted by the Comptroller of the city from the salaries or

wages of each employe and such other sums as are thereafter referred to. To that extent only are deductions compulsory under the act and there is no warrant of authority in the comptroller for deducting more than \$2.00 in any one month from the salary or wages of any employe, contrary to the wish of such employe.

It must be remembered also that this Pension Act is in the nature of a contract of insurance and that the beneficiary thereof should not be permitted to reap its benefits without paying for the insurance. Thus, a case might arise in which an employe who had taken a leave of absence or had been laid off after five (5) years of service, and had made default in the payment of his monthly dues, not intending, however, to return to the service of the city. After such default he might become seriously disabled, upon which event it would be to his advantage to tender the amount of his arrears and seek to collect the benefits under Section 9 of the act. Under such construction of the act the city would assume the risk without receiving payment for the risk, except in the event of disability.

From the foregoing it will be seen that in many cases it may not interfere with the proper administration of the Municipal Employes' Pension Fund either to deduct or receive more than the sum of \$2.00 per month, but that a contingency might arise which would render it unjust to the city as well as to the pensioners to permit such deduction by the comptroller or the receipt of such payment by the treasurer.

We believe from a reading of the entire act, and a consideration of its purpose and effect that the treasurer has no right to accept more than \$2.00 during any one month from an employe except as is otherwise provided in Sections 7 and 8 of the act.

We, therefore, are of the opinion that each employe should be required to pay the sum of \$2.00 during *each* current month of his temporary absence from the service; and that upon default thereof, his rights under the act would be terminated or suspended until reinstatement by his return to actual service and the deduction of the sum of \$2.00 from his salary or wages, and that until such reinstatement no money

should be accepted from him by the treasurer, after default in any of the payments provided by the act.

Respectfully submitted,
JOSEPH F. GROSSMANN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

APRIL 26, 1912.

HON. EDWARD COHEN, City Collector.

Dear Sir:

We are in receipt of your inquiry in respect to the issuance of licenses to wholesale malt, spirituous and vinous liquor dealers, for locations within the limits of the former Village of Edison Park, which was recently annexed to the City of Chicago.

Under the provisions of Section 18 of an act of the legislature entitled "An Act to provide for the annexation of cities, incorporated towns and villages, or parts of same to cities, incorporated towns and villages," approved and in force April 25, 1889, and the construction placed thereon by the Supreme Court of this state in the case of *People ex rel. v. Harrison*, 191 Ill. 257, all liquor ordinances which were in force and effect in the Village of Edison Park at the time of its annexation to the City of Chicago, would continue in full force and effect, notwithstanding such annexation, until repealed by the method provided therefor in such annexation act.

At the time of the annexation of Edison Park to Chicago an ordinance was in force in Edison Park, which had been passed October 25, 1910, and which was entitled, "An ordinance prohibiting the issuance of dram shop or saloon license, or the keeping of same in the Village of Edison Park."

Section 1 of said ordinance defined a dram shop or saloon and also intoxicating liquors. Section 2 declared the territory included within the limits of the village to be a prohibition district. Section 3 provided that no person should sell or give away any intoxicating liquor within the village.

Section 4 provided that it should be unlawful to open and maintain any saloon, dram shop or other place for the purpose of selling or giving away, or dealing in any manner in intoxicating liquor. Section 5 provided a penalty for violations of the ordinance. Section 6 provided that no license should be granted to any person for the purpose of opening or maintaining any such establishment as is provided against in such ordinance.

We are of the opinion that so long as the above mentioned ordinance remains in force, no dram shop license should be issued for a location in the territory within the limits of the former Village of Edison Park.

It is manifest from the entitling of the ordinance and from the provisions thereof generally, that the intent of its framers was to limit its operation as expressed in its title, to "prohibiting the issuance of dram shop or saloon license, or the keeping of same in the Village of Edison Park."

There are some expressions in the ordinance, which, if taken alone, might seem to broaden its scope, but we are satisfied that such expressions when considered in connection and as a part of the entire ordinance, relate only to dram shops, and that the provisions of the ordinance do not apply to the sale of intoxicating liquors by wholesale.

In the absence of any ordinance in force in the Village of Edison Park at the time of its annexation to Chicago, governing the sale of liquors by wholesale, the ordinances of the City of Chicago in respect to that subject-matter, immediately upon the annexation, extend over and become operative throughout the territory formerly embraced in that village. The Chicago ordinances (Sections 1553 to 1572, inclusive, of The Chicago Code of 1911), provide for the licensing wholesale malt, spirituous and vinous liquor dealers, and in our opinion, such ordinances of the City of Chicago are now in force and effect throughout the limits of the former Village of Edison Park.

We are therefore of the opinion that licenses for wholesale malt, spirituous and vinous liquor dealers, may be issued

for locations in the territory embraced in the former Village of Edison Park.

Yours respectfully,
BRYAN Y. CRAIG,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

APRIL 27, 1912.

HON. L. E. GOSSELIN, Deputy Comptroller.

Dear Sir:

In compliance with your verbal request of yesterday, we beg to advise you that Section 3 of Chapter 67 of Hurd's Revised Statutes is as follows:

"That whenever a board of inspectors have been organized as in Section second of this act directed, they shall have power and authority to establish and adopt rules for the regulation and discipline of the said house of correction, for which they have respectively been appointed, and, upon the nomination of the superintendent thereof, to appoint the subordinate officers, guards and employes thereof; TO FIX THEIR COMPENSATION AND PRESCRIBE THEIR DUTIES GENERALLY; to make all such by-laws and ordinances in relation to the management and government thereof as they shall deem expedient. No appropriation of money shall be made by the said board of inspectors for any purpose other than the ordinary and necessary expenses and repairs of said institution, except with the sanction of the legislative authority of said city."

This section standing by itself, would seem to confer upon the board unlimited authority to fix the compensation of employes of the House of Correction. But this statute must be read in connection with Sections 88 to 91, inclusive, of Chapter 24, Hurd's Revised Statutes.

Therefore, considering Sections 88 to 91 of Chapter 24 in connection with the House of Correction Act, we are impelled to the conclusion that the board of inspectors have not unlimited power to fix or change the compensation of employes after the first quarter of each fiscal year.

Section 89 of Chapter 24 provides:

“The city council of cities and board of trustees of villages, shall, within the first quarter of each fiscal year, pass an ordinance, to be termed the annual appropriation bill, in which such corporate authorities may appropriate such sum or sums of money as may be deemed necessary to defray ALL NECESSARY EXPENSES AND LIABILITIES OF SUCH CORPORATION; and in such ordinance shall specify the objects and purposes for which such appropriations are made, and the amount appropriated for each object or purpose. NO FURTHER APPROPRIATIONS SHALL BE MADE AT ANY OTHER TIME WITHIN SUCH FISCAL YEAR, unless the proposition to make each appropriation has been first sanctioned by a majority of the legal voters of such city or village, either by a petition signed by them, or at a general or special election duly called therefor.”

Section 91 provides:

“No contract shall be hereafter made by the city council or board of trustees, or any committee or member thereof; and no expense shall be incurred by any of the officers or departments of the corporation, whether the object of the expenditure shall have been ordered by the city council or board of trustees or not, unless an appropriation shall have been previously made concerning such expense, except as herein otherwise expressly provided.”

We therefore advise you that, while the Board of Inspectors of the House of Correction has authority to fix compensation of employes, that after the compensation of employes has once been fixed during the first quarter of the fiscal year and an appropriation made by the city council for the payment of such compensation, such compensation may not be refixed or changed, except that such compensation may be decreased below the amount fixed by the annual appropriation bill or increased to the amount fixed by the annual appropriation bill but after the first quarter of the fiscal year said Board of Inspectors has no power to increase the compensation of employes to an amount greater than that fixed by the annual appropriation bill.

Very respectfully yours,
 CHARLES M. HAFT,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

APRIL 27, 1912.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

You submitted to this department a letter accompanied with six different hand-bills advertising parties at which prizes are distributed, with a request for an opinion on same.

The letter stated that the bills "are handed to you from place to place" and that all persons who pay the price are welcome at the games.

The bills in question advertised parties at different times and places, and announced that prizes of value would be distributed. The prizes were of a character attractive to women, and the parties are evidently intended for women only. Three of the bills plainly stated that they were euchre parties, a fourth spoke of the "first game," and the remaining two, while not using apt words, nevertheless indicated that the parties advertised were card parties. Besides the prizes to be distributed to players, two of them promised a free drawing for some special prize to all who attended. While there was nothing on the bills to indicate that an admission fee was to be charged, the wording in every instance was such that it could readily be understood as an advertisement of a public card party where the participants played for prizes. The fact that these parties are thus advertised indicates also that either an admission fee or a fee for playing is required.

The parties and the games played there are undoubtedly a form of public gambling patronized by women. Prizes may be lawfully distributed at parties where they are awarded to winners in contests of speed, skill or intellectual or other ability, but not as a result of games of cards even though skill enters more or less into all such games.

The statute relating to gaming is so plain that there is no legal question involved in such a case. All who participate in the game render themselves liable under Section 126 of the Criminal Code, which reads as follows:

"Whoever shall play for money, or other valuable thing, at any game with cards, dice, checks, or at billiards, or with any other article, instrument or thing whatsoever, which may be used for the purpose of playing or betting upon, or winning or losing money, or any

other thing or article of value, or shall bet on any game others may be playing, shall be fined not exceeding \$100 and not less than \$10."

It is possible also to prosecute under Section 978 of The Chicago Code of 1911, although this section of the ordinance is less specific in regard to card games than the statute.

We return herewith the letter and bills to which we refer.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

APRIL 30, 1912.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Mr. B. P. Warren has filed with the city collector an application for a license to keep a saloon at 1553 West Van Buren street for the license period beginning May 1, 1912. The application is accompanied by a plat of the building in which the proposed saloon is to be kept, from which it appears that the building is located at the southeast corner of West Van Buren street and Ashland boulevard, and has a frontage of forty-eight feet on West Van Buren street and twenty feet on Ashland boulevard.

The plat further indicates that a cigar store is to be kept in the west fifteen feet of said building, the entrance to said cigar store being diagonally across the southeast corner of West Van Buren street and Ashland boulevard.

Said plat further indicates that the entrance to the proposed saloon is on West Van Buren street, about thirty-three feet east of Ashland boulevard.

The plat further indicates and the applicant states that he intends to forthwith build a solid wall with no doors or openings therein entirely across the building and fifteen feet east of and parallel with Ashland boulevard and that this wall will separate the cigar store from the proposed saloon.

Section 1545 of The Chicago Code of 1911 provides that no license shall be issued for keeping a dram shop "at any

place located on or along any boulevard or pleasure driveway'' (with certain exceptions not in point).

We are of the opinion that if, as indicated on the plat, the only entrance to the saloon is on West Van Buren street about thirty-three feet east of Ashland boulevard and the saloon premises are separated from the cigar store by a solid wall without openings located fifteen feet east of Ashland boulevard, that the issuance of a saloon license for the location mentioned would not be violative of the ordinance prohibiting the issuance of a license for keeping a saloon at any place located on or along any boulevard or pleasure driveway.

If the dividing wall should not be constructed or if it should be constructed and thereafter doors or other openings cut through the wall and the saloon and cigar shop thus connected, the license would be subject to revocation.

Yours respectfully,
BRYAN Y. CRAIG,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

MAY 2, 1912.

MR. JOHN FITZPATRICK, Pres. Chicago Federation of Labor,
Chicago, Illinois.

Dear Sir:

Your favor of the 13th ultimo in reference to the Eight Hour Law and the Day Labor Law, was referred to me. You request an opinion on the three following questions:

First. Whether the Board of Local Improvements can "enforce" Sections 2134 and 2135 of the Code of Chicago, 1911, providing respectively that eight hours shall constitute a legal day's work, and that payment shall be made for over-time in excess of eight hours. Second. Whether the Board of Local Improvements can employ day labor in constructing local improvements, under the provision of the recent act of the Legislature authorizing municipalities to construct public improvements by day labor. Third. If this cannot be done by the Board of Local Improvements "is it possible by an ordinance to have the Public Works Department undertake

to construct streets by bidding in competition with street contracting firms or otherwise?"

In your first inquiry I presume that the question which you desire information upon is whether in constructing public works the City of Chicago through the Board of Local Improvements, has the power to provide by ordinance for an eight-hour day and for payment of overtime, and to insert similar provisions in the contract and specifications.

I am of the opinion that the City of Chicago possesses no such power. It has been repeatedly held by the Supreme Court of Illinois that "a provision in the specifications for a local improvement which limits the right of the contractor and laborers to agree upon the number of hours to constitute a day's work and authorizes a forfeiture of the contract if the contractor allows laborers to work more than eight hours a day, is illegal and void."

McChesney v. People, 200 Ill. 146;

Fiske v. People, 188 Ill. 206.

In the *Fiske* case, *supra*, which is one of the leading cases on the subject, it was also held that "any statute, providing that the employer and laborer may not agree with each other as to what time shall constitute a day's work is an invalid act."

In reply to your second question I am of the opinion that the Board of Local Improvements does not possess the power to employ day labor in the construction of local improvements, under the recent act of the Legislature granting the power to municipalities to construct public improvements by day labor. (Section 116a, Chapter 24, Cities & Villages Act, Hurd's Revised Statutes, 1911, page 278.)

This enabling act expressly excepts "any work or public improvements to be paid for in whole or in part by special assessment." But even if the act did not contain the exception referred to, it is clear from the Local Improvement Act itself that all improvements to be paid for by special assessment or special taxation would have to be constructed by contract. Special assessment proceedings are purely statutory, and the Local Improvement Act, which is the sole authority for the construction of improvements by special assessment, does not confer the power on the city to employ

day labor. Section 36 of the act prescribes that when a local improvement is to be paid for in whole or in part, by special assessment, the proceedings for the making of such assessment shall be in accordance with the provisions of the act which follow Section 36. In the sections which follow relating to the construction of the work it is directed that the work shall be performed by contract, and by Section 80 of the act the property owners are allowed, on certain conditions, to construct the improvement provided they can do it at ten percentum less than the price at which the contract was awarded.

Without citing other provisions of the act which also indicate that only the contract method is contemplated, it is sufficient to say that the reading of the act as a whole clearly shows that the mode of constructing local improvements by special assessment is limited to contract.

In reply to your third inquiry I would say that under the enabling act authorizing municipalities to construct public improvements by day labor, I am of the opinion that where the improvement is to be paid for by general taxation or out of the general funds of the city, and not by special assessment or special taxation, the Commissioner of Public Works "or other proper officers to be designated by ordinance" is empowered to "superintend and cause to be carried out the construction" of such improvement by day labor. In doing this, however, the "Department of Public Works" would not bid "in competition with street contracting firms" as suggested by you, but there would be no bidding whatever, as the work would be done by direct employment of day labor by the city just as would be done by an individual contractor.

I hope that I have clearly apprehended your questions and have fully replied to them. If I have not I shall be pleased to answer any further questions in the premises.

Very respectfully yours,
FRANK JOHNSTON, JR.,
Assistant Corporation Counsel.

Approved:
PHILIP J. McKENNA.

Approved:
WM. H. SEXTON,
Corporation Counsel.

MAY 6, 1912.

HON. JOHN McWEENY, General Superintendent of Police.

Dear Sir:

You referred to this department the question whether an exhibition may be given in which the participants are protected with masks and shields and use gloves in a contest similar to a boxing or sparring exhibition. At the same time the party who desires to give such entertainments and who appears to be the patentee of the mask used for that purpose, exhibited to the writer the mask, which is in appearance very much like the ordinary catcher's mask used in baseball games, and the shield, which consists of a pad for the upper part of the body. The boxing gloves to be used are said to be of soft quality.

The question is whether by the use of these protective appliances what would otherwise be a boxing or sparring exhibition comes within the law?

Boxing and sparring exhibitions are prohibited under the following section of the statutes:

“Section 235. Whoever instigates, carries on, promotes or engages in as a witness, any sparring or boxing exhibition, shall be fined not exceeding \$500, or confined in the county jail not exceeding six months.”

The language of the statute is so plain and so comprehensive that the only doubt that can arise as to its interpretation is as to the meaning of the words “sparring” or “boxing.”

An exhaustive search of the authorities fails to disclose a case where there has been a judicial interpretation of these words. We must therefore rely on the definitions given in the dictionaries in common use and recognized as standards. The law gives to words the meanings which are commonly accepted.

The following definitions, so far as they relate to the subject under consideration, are taken from the Century Dictionary:

Box v.i.—To fight with the fists, whether bare or incased in boxing gloves; combat with or as with the hands or fists.

BOXING: n.—The act or practice of fighting with the fists, with or without boxing gloves; sparring.

SPAR: v.i. 1.—To rush forward in attack; make an onset.

2. To rise and strike with the shanks or spurs; fight, as cocks, with the spurs protected with leather pads, so that the birds cannot injure each other.

3. To make the motions of attack and defense with the arms and closed fists; to use the hands in or as if in boxing, either with or without boxing gloves; practice boxing.

SPAR: n. 1.—A preliminary sparring action; a flourish of the arms and fists in putting one's self in the attitude of boxing.

2. A sparring match; a contest of boxing or striking; also a cock fight in which the contending cocks are not permitted to do each other serious harm, or in which they have their spurs covered with stuffed leather pads, so that they cannot cut each other.

Webster's International Dictionary gives the following:

Box: v.i.—To fight with the fist; to combat with, or as with, the hand or fist; to spar.

BOXING: n.—The act of fighting with the fist; a combat with the fist; sparring.

SPAR: v.i.—To strike with the fist or spurs, as cocks do.

To use the fists and arms scientifically in attack or defense; to contend or combat with the fists, as for exercise or amusement; to box.

SPAR: n.—A contest at sparring or boxing.

A movement of offense or defense in boxing.

While the proposed exhibition may seem to be entirely harmless and one from which no immoral results can flow, the definitions given above, which must be regarded as the ordinary meanings to be attributed to the words defined, indicate that the statute prohibits such an exhibition.

We have given the above definitions in full, in order that it may be seen that in all standard authorities there is a distinct difference between the words "boxing" and "sparring," or at least that the term "boxing" includes more than the word "sparring." This distinction was recognized in the act by the legislature. Otherwise there would be no occasion for using both words. It must be assumed, therefore, that the exhibitions which are prohibited are not only exhi-

bitions where persons actually strike each other, but also those in which the motions of striking are gone through with, even though the fists and body may be protected in such a way that no injury can result.

The legislature in passing so sweeping a measure may have considered the effect of the exhibition harmful, even though the participants themselves could not be injured if well protected. The fact that the statute does not prohibit boxing and sparring, but only an exhibition of boxing and sparring, lends force to such a view.

We feel bound, after careful consideration, to hold that the proposed exhibition is contrary to law and that it should not be permitted.

Yours respectfully,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

MAY 6, 1912.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

We herewith hand you a draft of an order relative to the confession of judgment by the city on behalf of the Calumet & South Chicago Railway Company for two-thirds of the cost of raising the tracks of said company in Superior avenue, between 83d and 87th streets, from their present grade to the grade established by the ordinances of the City of Chicago.

The ordinance passed by the city council granting to the Calumet & South Chicago Railway Company the right to occupy the street in question provides in part as follows (Council Proceedings, March 30, 1908, p. 4775):

“The tracks to be maintained by the company shall not be elevated above the surface of the street or public way in which they are placed. They shall be laid and maintained by the company so as to conform to the grade of such street or public way as the same is or from time to time hereafter shall be, established by the city council.

All new tracks shall be laid with the best materials and in the most approved modern manner.

In laying or relaying rails in any of the streets included in the accompanying ordinance upon which more than one track is located the distance between centers of tracks may remain as at present, but in order to accommodate large, modern cars, and provide for their safe passage, this distance may be at least nine (9) feet eight and one-half ($8\frac{1}{2}$) inches between center lines of tracks. The tracks at curves wherever practicable shall be laid to such center as to enable cars to pass with suitable and safe clearance. The exact location of tracks in the streets shall be subject to the approval of the Commissioner of Public Works."

We understand it is the contention of the railway company that by virtue of the language employed in the ordinance, and to which we have just referred, it is the duty of the city to furnish to the railway company the grade at which tracks are to be laid.

We are unable to concur in this construction of the language employed in the ordinance to which we have just referred. So far as the question of grade is concerned, the paragraph which we have first quoted provides unequivocally that the tracks shall be laid and maintained so as to conform to the grade of the street established by the city council, and in our opinion that is the only language in the ordinance that was intended by the council to pertain to the subject of the grade at which tracks are to be laid.

We have in mind the concluding sentence of the last paragraph which we have quoted, which provides "the exact location of tracks in the streets shall be subject to the approval of the Commissioner of Public Works."

In our opinion the sentence which we have last quoted has no reference whatever to the subject of grades, but that it pertains solely to the location at which tracks shall be laid in the street with reference to the curb lines of the street.

We are therefore of the opinion that it is not the duty of the city to furnish to the railway company the grade at which it shall lay its tracks and that, therefore, the city is not legally liable to pay or to contribute to the payment of the expense of changing the grade of the tracks in question to that required by the city ordinances. We understand, however, that it is not the disposition of the council to re-

gard the question in a strict legal sense, but rather to regard it in an equitable light and to assume a share of the expense of changing the grade owing to the fact that an engineer in the employ of the city furnished the grade at which the tracks were actually laid to the railway company and made a mistake in so doing.

Yours respectfully,

CHAS. M. HAFT,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

MAY 6, 1912.

N. SHURE COMPANY, Madison & Franklin Streets, Chicago.

Gentlemen:

Replying to your communication of April 23, 1912, addressed to this department, we beg to advise you that Section 1 of an ordinance passed July 17, 1911, Council Proceedings of that date, page 1062, is as follows:

“No person shall at any time discharge or set off anywhere within the City of Chicago, or have in his or her possession for such purpose, any toy pistol, toy gun, toy cannon, blank cartridge, or any fireworks, fire crackers, torpedoes, bombs, rockets, spinwheels, fire balloons, Roman candles, detonating canes or ammunition therefor, or any substances or articles of an explosive nature designed or intended to be used as fire works; provided, however, that the Mayor of the City of Chicago may permit or order the public display of fire works by permit in writing issued by him as hereinafter provided. And provided further, that pyrotechnic displays of fireworks may be given at any time in licensed amusement parks under the supervision of the licensee and at least one representative of the police department of the City of Chicago.”

Section 950 of The Chicago Code of 1911 is as follows:

“It shall hereafter be unlawful for any person, firm or corporation to keep or expose for sale any fireworks, fire crackers, torpedoes, bombs, squibs, rockets, spinwheels, fire balloons, Roman candles, detonating canes or ammunition therefor, or any substances or articles of an explosive nature designed or intended to be used

as fireworks, without a license issued for that purpose as hereinafter provided."

We assume that you desire to ascertain whether or not in our opinion "sparklers" are included in either one of the sections from which we have just quoted. The question then arises on the proposition as to whether or not "sparklers" may be regarded either as fireworks or as a substance or article of an explosive nature designed or intended to be used as fireworks. Webster defines fireworks as follows:

"A device for producing a striking display of light or a figure or figures in plain or colored fire by the combustion of materials that burn in some peculiar manner."

The idea of the council evidently was to regulate the use and sale of articles or substances peculiarly liable to occasional conflagrations when used, by reason of either their combustible or explosive nature. The question, therefore, concerning which you asked for our opinion, is one rather of fact than of law.

Considering the definition of fireworks to which we have just referred, it does not seem to us that "sparklers" fall within the category of fireworks, nor do they seem to us to be a substance or article of an explosive nature designed or intended to be used as fireworks.

Owing, however, to the fact that the question under consideration is more peculiarly one of fact than of law, it occurs to us that the Fire Department is in a better position to pass on the subject than the Law Department.

Yours very truly,

CHAS. M. HAFT,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

MAY 13, 1912.

TO THE BOARD OF TRUSTEES OF THE FIREMEN'S PENSION FUND,
Chicago, Illinois.

Gentlemen:

It appears from the correspondence and application transmitted to this department, that William Carroll was appoint-

ed a member of the Chicago Fire Department in 1874; that he had been continuously in the service of the fire department from 1874 to the date of his appointment to the position of City Electrician on May 18, 1905; that he was over fifty years of age and had served more than twenty-two years in the fire alarm telegraph branch of the fire department of the City of Chicago, of which the last two years of such service had been continuous at the time he made his application to be retired and placed on the pension roll, which was on June 2, 1905.

With his application for a pension, Mr. Carroll transmitted a letter, stating that he had no desire to draw a pension at that time, nor would he accept it if offered, but that the application was made at that time on the advice of his counsel for the purpose of saving his right to a pension after his connection with the city should terminate.

The Board of Trustees of the Firemen's Pension Fund placed his application on file and took no action thereon. Mr. Carroll having recently resigned from the services of the city, now requests your honorable board to take action upon his application.

At the time of the filing of Mr. Carroll's application there was in full force and effect an act entitled, "An Act to create a board of trustees of the Firemen's Pension Fund; to provide and distribute such fund for the pensioning of disabled firemen and the widows and children of deceased firemen; to authorize the retirement from service and the pensioning of members of the fire department, and for other purposes connected therewith, in cities, villages or incorporated towns whose population exceeds 50,000 inhabitants having a paid fire department," approved May 13, 1887, in force July 1, 1887, as amended by an act approved March 28, 1889, in force July 1, 1889. Section 10 of said act was as follows:

"Any member of the fire department of any such city, village or incorporated town, after becoming fifty years of age and having served twenty-two years or more in such fire department, of which the last two years shall be continuous, may make application to be relieved from such fire department, or if he shall be discharged from such fire department, the said board of trustees shall

order and direct that said person shall be paid a monthly pension equal to one-half of the amount of salary attached to the rank which he may have held in said fire department at the time of his retirement or discharge; and the said board upon the recommendation of the fire marshal or chief officer of any fire department, provided for in this act, shall have the power to assign members of the fire department retired or drawing pensions under this act, to the performance of light duties in such fire department in case of extraordinary emergencies. After the decease of such member, his widow or minor child or children under sixteen years of age, if any surviving him, shall be entitled to the pension provided for in this act, but nothing in this or any other section of this act shall warrant the payment of any annuity to any widow of a deceased member of such fire department after she shall have remarried."

The question first arises whether Mr. Carroll at the time he filed his application for a pension was entitled thereto under the foregoing act. While the applicant was not an active *fireman* in the sense in which that word is commonly used,—he was, nevertheless, a member of the fire department, and as such entitled to the benefits of the Pension Act.

Leffingwell v. Kiersted et al., 65 Atl. (N. J. Sup.) 1029.

Since the filing of the application herein the Pension Act was amended in many substantial particulars and the persons entitled to the benefits of the act were designated by the amendment to Section 11 of said Pension Act by an act approved June 1, 1907, in force July 1, 1907. Said Section 11 is as follows:

"This act shall apply to all persons who are now or shall hereafter become members of such fire department, and to all persons who are now beneficiaries of the *Firemen's Pension Fund*, and all such persons shall be eligible to the benefits secured by this act."

The power of your board to award pensions was thereby limited to three classes of persons:

(1) Persons who on July 1, 1907, were members of the fire department.

(2) Persons who became members of the fire department after July 1, 1907.

(3) Persons who on July 1, 1907, were beneficiaries of the *Firemen's Pension Fund*.

When Mr. Carroll accepted the position of City Electrician, he thereby abandoned his employment in the fire department, and was no longer a member thereof after May 8, 1905, as appears from his letter of May 31, 1905, to Mr. John Campion, Fire Marshall. It is also apparent that Mr. Carroll did not become a member of the fire department at any time after July 1, 1907.

Was the applicant a "beneficiary" of the Firemen's Pension Fund within the purview of Section 11 of the act, at the time it went into force and effect?

In considering the effect of the amendment of 1907 as shown by the italicised words in Section 11 above quoted, in the case of *O'Connor v. Board of Trustees*, 155 Ill. App. 460, Mr. Justice Smith, who delivered the opinion of the court, on page 476 said:

"If Section 11 had been literally re-enacted, the benefits of the Act of 1907 would have been confined to those in the service on July 1, 1907, and those that would thereafter enter the service, and it might have been interpreted to cut out those who had become entitled to pensions solely by virtue of the Act of 1887 who were then *drawing* pensions but who were no longer in the active service on July 1, 1907. To make it perfectly clear that this class should continue to receive the benefits of the Act of 1887, as changed by the Act of 1907, it was necessary to amend Section 11 of the Act of 1887 by the addition of the words which were inserted in this amendment."

While the foregoing language tends to indicate that the word "beneficiaries" *includes* all persons who were then *drawing* pensions, we believe it cannot be construed so as to exclude other classes of persons who might otherwise come within the meaning of that term.

The word "beneficiary" is defined in the Century Dictionary as: "*Connected with the receipt of benefits, profits or advantages.*" Also, "One in *receipt* of the profits of an estate held in trust; *one for whose benefit a trust exists.*"

The Pension Fund is undoubtedly a trust for the benefit of those who might become entitled to the payments therein provided for upon the happening of the contingencies named in the act. By substituting the words "The Pension Fund"

for the words "a trust" in the last definition of the word "beneficiary," we may see that "beneficiary" as used in the Pension Act, may be defined as: "One for whose benefit the Pension Fund exists," and by substituting in Section 11 as amended this definition instead of its equivalent and properly paraphrasing the same, it will read as follows:

"This act shall apply to all persons who are now or shall hereafter become members of such fire department, *and to all persons for whose benefit the Firemen's Pension Fund now exists*, and all such persons shall be eligible to the benefits secured by this act."

Mr. Carroll being one of the persons who, prior to the amendment of 1907 was entitled to the benefits of the Firemen's Pension Fund Act, must be classed as one of those persons for whose benefit the Firemen's Pension Fund existed at the time the amendment went into effect.

In Bouvier's Law Dictionary, "beneficiary" is defined as follows:

"A term suggested by Judge Storey as a substitute for a *cestue que trust* and adopted to some extent. 1 Storey, Eq. Jur., Sec. 321," and also: "In insurance the person named in the policy to whom the insurance is payable upon the happening of the event insured against."

We believe that Mr. Carroll can be considered as having been a *cestue que trust* of the Pension Fund at the time the amendment of 1907 went into effect. Furthermore, the Pension Act is in the nature of insurance, and if the word "beneficiary" were used in the same sense in which it is used in an insurance policy as indicated by Bouvier, the applicant would certainly come within that class of persons designated by the amendatory act as "beneficiaries of the Firemen's Pension Fund."

Moreover, the word "beneficiary" is used in the act indiscriminately with the words "Person entitled to the benefits of the Pension Fund." In Section 8 of said act appears the following language:

"If at any time there shall not be sufficient money in such pension fund *to pay such persons entitled to the benefits thereof* the full amount per month as heretofore provided, then, and in that event, an equal percentage

of such monthly payment shall be made to each *beneficiary* thereof until the said fund shall be replenished to warrant the payment in full to each *beneficiary*."

There being no doubt that the applicant was one *entitled to the benefits of the Act* of 1887 at the time the amendment went into force and effect, he must be included in that definition of the word "beneficiary" apparently adopted by the Legislature in that very act.

If we should adopt the language of the Appellate Court in the O'Connor case above cited as the exclusive definition of the term "beneficiary," it would necessitate the exclusion from the benefits of the Pension Act, as amended in 1907, not only all those persons who were *entitled to be voted* a pension, but on account of their own inactivity or by reason of the inactivity of the Board of Trustees had not perfected their right to *receive* a pension, but it would also exclude all widows and minor children of members of the fire department who died so shortly prior to the time the amendatory act went into force and effect as to make it physically impossible for them to have been voted a pension prior to the time the amendment became effective.

We cannot believe it was the intention of the Legislature to exclude all that class of persons who were not members of the department on July 1, 1907, but who nevertheless were entitled to the benefits of the Pension Act prior thereto.

We are therefore of the opinion that the applicant is entitled to a pension under the law as it exists today.

Respectfully submitted,

JOSEPH F. GROSSMAN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

MAY 15, 1912.

HON. HARRY E. LITTLER, Chairman, Committee on Harbors,
Wharves and Bridges.

Dear Sir:

The above matter which was referred to this department with the communication of Francis D. Connery, Esq., City

Clerk, of the 1st instant, presents for consideration the power of the municipal authorities over that part of the Illinois and Michigan Canal which lies within the boundaries of the City of Chicago.

In order that your committee may gain the requisite information which is necessary to a legal determination of the question, I call your attention to the following laws:

1. In 1822 the Congress of the United States authorized the State of Illinois to survey and mark, through the public lands of the United States, the route of the canal connecting the Illinois River with the southern bend of Lake Michigan. Ninety feet of land on either side of the canal were, by the terms of the act, forever reserved from any sale to be made by the United States, and *the use of the same forever vested in the State of Illinois for a canal, and for no other purpose whatever, on condition, however, that if said ground shall ever cease to be occupied by, and used for a canal suitable for navigation, the reservation and grant so made shall be void and of no effect.*

The act further provides that said canal, when completed, shall be and forever remain a public highway for the use of the government of the United States, free from any toll or other charge whatever, etc.

Every section of land through which the canal passed was reserved from future sale until otherwise directed by law.

In 1827 another law of the Congress granted to the State of Illinois in aid of said canal, a quantity of land equal to one-half of five sections in width, on each side of the canal, and conferred upon the Legislature of the state authority to sell and convey said land, etc.

Pursuant to these enactments the State of Illinois undertook the construction of the Illinois and Michigan Canal. For the better regulation of the navigation and the management of the canal, and the disposal of the lands granted in aid of its construction by the government of the United States, an act was passed creating a board of canal commissioners. This board is still in existence and acting under the laws passed by the general assembly.

In 1903 the legislature passed an act "to enlarge the corporate limits of the Sanitary District of Chicago, etc."

By Section 2 of this act the legislature vested the Sanitary District Board with power "to use what is known as the 'Calumet Feeder' of the Illinois and Michigan Canal and lands adjacent to such feeder belonging to the State of Illinois for the site of any such channel * * * and * * * *the right to construct a channel across said Illinois and Michigan Canal, without being required to restore said Illinois and Michigan Canal or said feeder to its former usefulness. If by reason of said abandonment, a stagnant stream or pool of water shall remain upon the deposits of Chicago sewage, accumulated in said Illinois and Michigan Canal by reason of its years of usefulness by the City of Chicago as a sewage outlet, said sanitary district shall fill up said canal to a depth sufficient to remove said condition and prevent the spread of pestilence and disease throughout the territory in which said Illinois and Michigan Canal is abandoned; and the other powers and jurisdiction of said sanitary district of Chicago over and in connection with such added territory shall be the same as that vested in it over the territory included within the limits of said sanitary district as originally organized.*"

Section 8 of said act enjoins upon said sanitary board, compliance with the provisions of the acts of Congress of 1822 and 1827, in so far as that portion of the canal is concerned which is abandoned by the terms of the act.

By the 40th paragraph of Section 1 of Article V of the Cities and Villages Act, the city council is vested with power

"To provide for the cleansing and purification of waters, watercourses and canals, and the draining or filling of ponds on private property, whenever necessary to prevent or abate nuisances."

From the foregoing exposition of the laws I am of the opinion:

1. That by the Act of Congress of 1822 the use of the land needed for canal purposes was forever vested in the State of Illinois, the reservation and grant to be null and void whenever the ground shall cease to be occupied by and used for a canal suitable for navigation.

2. That the management and control of the canal is vested in three commissioners appointed by the governor by and with the consent of the senate, subject only to the powers vested in the authorities of the sanitary district by the Act of 1903.

3. That the City of Chicago has the power to abate a nuisance caused by the neglect of the sanitary board to perform its duty under the Act of 1903.

4. That the City of Chicago can acquire title to that part of the canal here in question by the concurrent action of the United States and of the State of Illinois and then only for municipal purposes.

If it should be a fact that this part of the canal has to all intents and purposes been abandoned, permission should be asked of the proper officers of the United States government and of the Canal Commissioners to fill in the same and thereby prevent the spread of disease within the city.

Very truly yours,
NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

MAY 16, 1912.

DR. G. B. YOUNG, Commissioner of Health.

Dear Sir:

The communication of the assistant commissioner of health with reference to obtaining new frontage consents for the proposed Sheridan Park Hospital, to be located at No. 628 Belmont avenue, was referred to the writer for an opinion.

It seems that a hospital known as the Lake View Hospital was located on the premises before the ordinance requiring frontage consents was passed. In fact, this institution was there before power was given by the legislature to the municipality to control the location of hospitals. It is now proposed to move the Lake View Hospital to another location, and the Sheridan Park Hospital, a corporation which

has been formed for the purpose of operating a general hospital, seeks to obtain the premises now occupied by the former. The question is whether the new hospital can succeed to the same rights which now inhere to the present occupant.

Aside from the question of procuring frontage consents, the proposed hospital, under the present ordinance, could not be located there if the rights of the Lake View Hospital are non-transferable, because Section 1220 provides that no hospital shall hereafter be erected or established within four hundred feet of any property used for public or parochial school purposes, and the property in question is in close proximity to two or more schools.

A strong protest against the establishment of the new hospital has been raised by property owners in the vicinity. Practically all of these have joined in written objections to the issuance of a license, which objections have been forwarded by you to this department.

The most diligent search fails to reveal a case at all similar to this on which we can rely as an authority, and we are, therefore, compelled to decide the point on general principles of law applicable to the case.

The view urged upon us by the parties protesting, when reduced to its final analysis, amounts to the contention that a party, after erecting a building for a lawful purpose, may be deprived of the use of such a building by a subsequent police regulation. The principle is the same whether the building is an old or cheap structure or worth millions.

This department at all times, in passing on the validity of ordinances, has advised against provisions which have for their object so extreme an exercise of the police power. A glance at the chapter on buildings in The Chicago Code of 1911 will show that this has been guarded against. Existing buildings which are put to a certain use are not disturbed as to their occupation for such purposes, and the retroactive features of the code are limited to means of ingress or egress. Even in the case of such structures as theaters, where undoubtedly a greater power exists than the ordinance seeks to

enforce, the line is drawn between buildings in existence and used for that purpose and new buildings to be erected.

We call attention to the attitude of the department in such matters because to hold that the use of property may be destroyed by new provisions in the ordinances would be a departure from precedent. While it is true that all property is held subject to the power of the state and municipality to enforce reasonable police regulations, such an ordinance would be subject to grave doubt as to validity and would probably be held unconstitutional as a deprivation of property without due process of law.

It is necessary in the present instance to distinguish between the issuance of a license to a hospital viewed as an *institution*, and the location of a hospital regarded in the light of a *building* used for such purposes.

Where a new hospital is built there is no occasion for making such a distinction; but when, as is here proposed, a hospital is seeking to operate in a building which has already been used and is now being used for that purpose, it must be held that when a hospital is once legally established in a building the character of the building for all purposes of future occupancy is stamped and permanently fixed until there is a change in the character of the occupation. It would be just as reasonable to require a new owner of an "existing theater" to conform to building requirements for a "theater hereafter to be erected," or to require the new owner of a garage in a residential locality to again secure frontage consents, as to require the new occupants of a hospital building to again secure frontage consents or prevent them from using the building as a hospital on account of its proximity to a school. The injustice in the case of the theater or garage is more readily discernible, because such buildings cannot be used for other purposes, but the same rule is plainly applicable to a hospital or any other institution seeking to use a building for the same purpose for which it has always been lawfully used.

In other words, the license requirements of the ordinances have reference to a hospital as an institution while the frontage consents and location have reference to it as a building.

It is not the license which is being transferred with the property in the present instance, but the right to use the property in a certain way. A license is a personal privilege and not transferable, but the other is a property right that is transferable.

This right existed and inhered in the premises. Nothing which the municipality could do would have taken this right from the former owners.

This must be conceded under a well settled principle of law that where rights are vested they cannot be disturbed or invaded, except to the extent that is necessary by a reasonable exercise of the police powers—anything beyond that would be a deprivation of property without due process of law. To say that the former owners could not convey the right is in fact taking away at least a portion of that right.

The use of the property is the same as the property itself.

St. Louis v. Hill, 116 Mo. 527.

City of Brooklyn v. Chadeayne, 7 N. Y. Suppl. 501.

If the party who owns property has such a right as against an ordinance subsequently enacted, it is within his power to transfer the right. In other words, the use of the property is property under the law, and since he cannot be deprived of his property he can transfer the whole property, including the use.

If the property in question belonged to a person who rented it for hospital purposes to the Lake View Hospital it would seem quite clear that he would have the right to rent it to another concern for hospital purposes. That being the case, there seems to be no difference in principle, so far as transferring the title is concerned, from transferring the leasehold interest.

In view of the facts stated above, we are of the opinion that you are bound to issue a license for the proposed hospital upon proper application.

We return herewith the protests of property owners which you sent us.

Yours respectfully,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

MAY 16, 1912.

HON. EDWARD COHEN, City Collector.

Dear Sir:

We are informed by you that licenses to keep a dram shop at 544 East 61st street have been issued to William Clark for several successive license periods, including the period ending April 30, 1912, and that said Clark prior to May 1, 1912, filed with you his application for a renewal of said license for said location for the period beginning May 1, 1912, together with the required bonds and license fee.

You also state that prior to May 1, 1912, one Patrick E. Burke also filed with you an application for a license to keep a dram shop at the same location for the period beginning May 1, 1912, but that said Burke's application had been withdrawn.

You further state that on April 14, 1912, and thereafter certain persons, purporting to be owners of property in the locality where said saloon is located, filed with you writings protesting against the issuance of a dram shop license for said location to the said Burke or any other person, and that on April 30, 1912, a like protest was filed with you against the issuance of a renewal of license for said location to William Clark, Patrick Burke or any other person.

The location in question is in the territory included in the former Village of Hyde Park, and is subject to the liquor ordinances which were in effect in said village when it was annexed to Chicago in 1889.

The Hyde Park ordinance in force at the time of said annexation (and still in force) requires an applicant for a saloon license to have his application signed by a majority of the property owners according to frontage on both sides

of the street in the block in which such dram shop is to be kept, and also to be signed by a majority of the *bona fide* householders and persons or firms living in or doing business on each side of the street in the block in which said dram shop shall have its main entrance:

“Provided, however, that any person or firm who shall have made application as aforesaid, and received a license to keep a dram shop shall not be required to present an application as above, in order to obtain a renewal of the license, to himself or firm unless at least one-quarter of the property owners or *bona fide* householders, persons and firms doing business upon both sides of the street in the block upon which the said dram shop has its main entrance, shall file with the village comptroller at least thirty days prior to the time of the renewal of such license, a notice stating that the signers thereof object to the granting or renewing of the license to said person or firm.”

The ordinance plainly provides that a person to whom a license has been issued shall not, in order to obtain a renewal thereof, be required to present an application signed by a majority of the property owners and householders unless a protest against the issuance or renewal of the license is filed at least thirty days prior to the time for the renewal of the license.

It appears that the protests in the matter under consideration were not filed thirty days prior to May 1, 1912, which was the time for the renewal of the license in question, and it is therefore not necessary to determine whether the protests were signed by the required number of property owners or householders.

We are of the opinion that William Clark was not required to file an application for the renewal of his license for the period beginning May 1, 1912, signed by a majority of the property owners and householders. If he has otherwise complied with the ordinances respecting dram shop licenses, we recommend that the license be issued to him for the period beginning May 1, 1912.

We return herewith the above mentioned protests and the correspondence attached thereto.

Very truly yours,

BRYAN Y. CRAIG,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

MAY 17, 1912.

HON. WILLIAM J. McCOURT, Superintendent of the Bureau of Water, Chicago, Illinois.

Dear Sir:

In reply to your inquiry of May 13, 1912, and facts therein contained and three copies of affidavits and water bill thereto attached, as to your right to shut off the supply of water to the Banner Laundry Co., will say it appears from the facts, that on December 5, 1911, the Banner Laundry, a corporation, took possession of the premises known as 1830 Grand avenue, Chicago, in which premises theretofore the Marquette Laundry, since gone out of business, also operated a laundry and incurred a water bill from October 10 to December 5, 1911, for \$35.63.

The fact that Charles M. Mattman was formerly interested in the Marquette Laundry, to which concern all water rates were charged and billed during its possession of the above premises, has since then become a member of the Banner Laundry, does not give the Water Department a right to shut off the water supply of the Banner Laundry, as the Banner Laundry is a corporation, a separate and distinct entity by itself, and did not incur the above mentioned bill.

It would be unjust to penalize the Banner Laundry for sins committed by the Marquette Laundry, and furthermore action of this kind would subject the City of Chicago to litigation.

The only way to collect the water rates herein charged, is to sue the stockholders of the Marquette Laundry, if it was a corporation; or the partners of said concern if said Marquette Laundry was a partnership.

None of the facts cited in your communication would justify your department to proceed under Section 2780 which pertains to the shutting off of water.

City of Chicago v. Northwestern Life Insurance Co., 218 Ill., page 40, is decisive of the case at hand.

Respectfully submitted,

J. J. VITERNA,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

MAY 17, 1912.

H. L. LUCAS, Esq, Supt. Water Pipe Extension.

Dear Sir:

We have your request for an opinion as to the liability of the city for the payment of the sum of \$356.81, to the Sanitary District of Chicago, which represents the cost of replacing its conduit in Milwaukee avenue near Robey street.

It appears that in December, 1910, an invoice was rendered to the city by the Sanitary District in the above sum for damages alleged to have been caused by the agents of the city in the relaying of water mains, in Milwaukee avenue near Robey street; that the city did relay its mains in the said street owing to the defective condition of the existing mains and because the Sanitary District in originally replacing its conduit in Milwaukee avenue constructed the same directly over the city's water mains; that in laying the new main the city kept as close as was possible to the line of the old main, both on account of the number of obstructions that were found in the streets, and the necessity of retapping the existing services into the new main; that the amount of said invoice is correct, the labor and material having been furnished as therein set out and that the only question involved relates to the party upon which the burden of expense of repairing should fall.

We would respectfully advise you that upon investigation by this department it does not appear that the city had any notice that any repairs were contemplated along the

line of the said main, or that any damage had been inflicted upon the property of the Sanitary District by employes of the city, nor is there any contract, either verbal or written, in evidence which would bind the city to pay for any repairs made by the said district.

On the contrary, we do find that the work done by the city's employes was performed by skilled mechanics and that in the performance of their duties no negligence can rightfully be charged to them as agents of the city.

The power to control the use of the streets is expressly given to the city in the 13th clause of Article V, Chapter 24 of the Cities and Villages Act:

“To regulate the openings therein for the laying of gas or water mains and pipes and the building and repairing of sewers, tunnels and drains, and erecting gas lights.”

We therefore are of the opinion that the easement acquired by the Sanitary District under its charter to lay its conduit in Milwaukee avenue, or in any of the streets of the city, was subject to the paramount right of the city (the power to construct water mains being expressly conferred upon the city) and in constructing its conduit the Sanitary District knew, or was bound to know, that its use of the bed of the street was liable at any time to be interfered with whenever the city authorities might deem such interference necessary to the promotion of the public welfare.

Accordingly the city is not liable for the payment of any sum or sums of money whatever in this matter.

Yours respectfully,

EDWARD T. WADE,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

MAY 17, 1912.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

The two following questions have been addressed to this department for answer: First. What is the proper proced-

ure for the City of Chicago to pursue in condemning land for bathing beaches? Second. Whether the right to condemn is affected by the fact that the city council has appropriated \$250,000 for acquiring sites, etc., conditioned upon the approval by the voters of the City of Chicago of an ordinance authorizing the issuance of bonds in that amount?

In reply to the first question I would say that in a prior decision of this department dated July 7, 1911, it was held that the city possessed the general power to own and maintain municipal bathing beaches and bath houses; and that the power to condemn land for bathing beaches had by statute been expressly conferred on the city.

These provisions are respectively as follows:

“The City of Chicago may acquire by purchase or otherwise, municipal parks, playgrounds, public beaches and bathing places, and improve, equip, maintain and regulate the same.” (Section 6 of Part Three of Art. XII, of Cities & Villages Act, Section 193 ar, Hurd’s Revised Statutes 1911, page 287.) “To acquire in the manner now or hereafter provided by law for the taking of private property for public use, private lands bordering upon the public or navigable waters useful, desirable or advantageous for bathing beaches and recreation piers.” (Paragraph 97 of Art. V of Cities & Villages Act, Hurd’s Revised Statutes 1911, page 268.)

It was also suggested in the opinion referred to that the taking of property for bathing beaches would not be a local improvement and could not therefore be paid for by special assessment, but would have to be paid for out of the general funds of the city. In my opinion the above conclusions are correct but in answering your inquiry I shall again briefly refer to the authorities which support them.

The question to be determined is whether in condemning for the purpose stated the city should proceed under the Local Improvement Act of 1897 or under the Eminent Domain Act.

In order for the city to condemn under the Local Improvement Act of 1897 and to pay for the cost of the land taken by special assessment, it must appear that the improvement is a local one which by reason of its being confined to a particular locality would enhance the value of adjacent property by conferring special benefits upon it different from

the benefits which might be received generally by the public. (*Loeffler v. City of Chicago*, 246 Ill. 43.)

The question as to what constitutes a local improvement is one of fact (*Bush v. City of Peoria*, 215 Ill. 515), but the municipal authorities cannot arbitrarily determine that an improvement shall be regarded as local which in fact is general.

Loeffler v. City of Chicago, 246 Ill. 44.

In the present case, however, I am of the opinion that it would be clearly shown by the facts that the proposed improvement would not enhance the value of adjacent property and would not therefore be a local improvement which could be paid for by special assessment, but would be a public improvement which would have to be paid for out of the general funds of the city. If this conclusion is correct the procedure for the proposed condemnation would have to be that provided by the Eminent Domain Act, and not the Local Improvement Act.

In the recent case of *Village of Norris v. Lyon*, 251 Ill. 457 (October 25, 1911), it was held that where a condemnation improvement is to be paid for by general taxation "the proceedings could be had only under the Eminent Domain Act. The language of the decision is clear and unmistakable, but in view of the fact that it does not cite or refer to the earlier case of *Chicago & Northwestern Railroad Company v. City of Chicago*, 148 Ill. 141 (June 19, 1893, rehearing denied January 9, 1894), which is in conflict with it, I think it advisable to point out at some length the irreconcilable differences between the two cases.

The case of *Village of Norris v. Lyon*, 251 Ill. 457, holds, as stated, that where a condemnation improvement is to be paid for by general taxation "the proceedings could be had only under the Eminent Domain Act." The court said also that:

"The sections in the Local Improvement Act which provide for the assessment of compensation for property taken or damaged for a local improvement refer only to cases where the improvement is to be paid for wholly or in part by special assessment or special taxation."

In reaching their conclusion, however, the court made

no reference whatever to the provision of the Eminent Domain Act requiring the petitioner to attempt to agree on compensation before filing the petition to condemn nor did they enter into any discussion of the question. The decision consisted of a mere statement that where general taxation was to be the mode of payment "the proceedings could be had only under the Eminent Domain Act."

The case of *Chicago & Northwestern Railroad Company v. City of Chicago*, 148 Ill. 141, holds in substance that a municipality cannot condemn under the Eminent Domain Act, but is limited to the Local Improvement Act. It is true that this was not the precise point involved in the case, but it undoubtedly constituted a good and sufficient ground on which the decision could be placed.

The question actually presented was whether a municipality condemning under Article IX of the Cities & Villages Act was compelled to allege in its petition that it was unable to agree on compensation, as required by Section 2 of the Eminent Domain Act. It is apparent that this question could be decided by holding that a municipality could not proceed under the Eminent Domain Act, but was restricted to the Local Improvement Act.

This conclusion necessarily involved the decision that a municipality was not obliged to allege in its petition that it could not agree on the compensation; for if it could not proceed under the Eminent Domain Act, Section 2 of that act, requiring an attempt to agree on compensation, of course would not apply.

Furthermore in deciding the question involved on the record in case of *Chicago & Northwestern Railroad Company, supra*, the court gave the following specific reasons in support of their opinion:

1. That Section 2 of the Eminent Domain Act makes the failure to agree on compensation "a condition precedent to the exercise of the right to condemn."

2. That municipal corporations are not given the power by statute to agree either expressly or by implication.

3. That Section 2 of Article VII of the Cities & Villages Act requires the city council to pass an annual appropriation bill and forbids the making of any con-

tract or incurring any expense until an appropriation shall have been previously made; and that this negatives the existence of any power of a municipality to agree on compensation.

4. That a municipality cannot acquire property by private purchase, as such a practice would lead to favoritism and corruption.

5. That the special mode by which municipalities are authorized to condemn, would indicate that the legislature did not intend that they should proceed under the Eminent Domain Act.

It will be seen that these grounds of the decision are too directly and intimately connected with the main question in the case, to be considered *obiter dicta*.

People v. Read, 233 Ill. 351;

Pacific Co. v. Mason City, 199 U. S. 160.

They are deliberate, carefully considered expressions of the court and not mere passing statements.

The case of *City v. Hayward*, 176 Ill. 130, 135, like the case of *Chicago & Northwestern Railroad Company v. City of Chicago*, *supra*, also holds that a municipality cannot acquire land for street purposes by private purchase, but must condemn.

It has also been held in other decisions than that of *Chicago & Northwestern Railroad Company v. City of Chicago*, *supra*, that the failure to agree on compensation is a condition precedent to jurisdiction under the Eminent Domain Act.

Lake Shore & M. S. R. R. Co. v. City, 148 Ill. 567;

Reed v. O. & M. R. R. Co., 126 Ill. 48;

Bowman v. Venice R. R. Co., 102 Ill. 459;

City of Danville v. McAdams, 153 Ill. 216, 217;

2 Lewis on Eminent Domain, Sect. 497, page 893, 3d Ed.

There seems to be a distinction between municipalities and drainage districts as to the power of proceeding under the Eminent Domain Act. In *Smith v. Drainage District*, 229 Ill. 155, 160, it was held that a drainage district could proceed under the Eminent Domain Act.

From the above statement it is apparent that there is a conflict between the case of *Village of Norris v. Lyon*, 251

Ill. 457, and the case of *Chicago & Northwestern Railroad Company v. City of Chicago*, 148 Ill. 141. The former merely states without any discussion of the question whatever that the Eminent Domain Act is the proper one under which to proceed when an improvement is to be paid for by general taxation, while the latter specifically shows that the provisions of the Eminent Domain Act cannot be complied with by a municipality, which does not possess the power to acquire land by private purchase; and further holds that the legislature did not intend that municipalities should proceed under the Eminent Domain Act.

But notwithstanding the lack of harmony between these two decisions since the case of *Village of Norris v. Lyon*, 251 Ill. 457, is the later case it should be followed. I am of the opinion, therefore, that in the proposed condemnation the city should proceed under the Eminent Domain Act. The difficulty presented by Section 2 of that act requiring as a condition precedent to jurisdiction an allegation in the petition that the petitioner was unable to agree on compensation will have to be met in the best way possible.

In this particular case I am of the opinion that Section 6 of Part Three of Article XII of the Cities & Villages Act, hereinabove quoted, which among other things, authorizes the City of Chicago to acquire by purchase public beaches and bathing places, supplies the necessary power for the city to attempt to agree on compensation as contemplated by Section 2 of the Eminent Domain Act. Possessing this power of private purchase, and having the fund of \$250,000 appropriated by the city council available for carrying such power into effect, the city is in a position to attempt, in good faith, to agree on compensation before filing the petition to condemn, as required by Section 2 of the Eminent Domain Act.

In case an agreement on compensation could not be reached this fact may be brought to the attention of the court in any manner which will satisfy the court of the inability of the city and the property owner to agree. (*Cahill v. Village of Norwood Park*, 149 Ill. 156, 159.)

It has been held that where an offer had been made to an owner and the owner declined, saying that he could not

give an answer within a week, the petitioner was not compelled to wait that length of time before filing the petition; and that the refusal of the offer by the owner was a failure to agree. (*County of Mercer v. Wolff*, 237 Ill. 74, 79, 80.)

It will be observed that in the present case the City of Chicago is expressly empowered by statute to acquire by purchase public beaches and bathing places and that by reason of such power, Section 2 of the Eminent Domain Act can be complied with. But in cases where the city is not authorized by statute to purchase the property sought to be acquired, the city would not have the power to attempt in good faith to agree on compensation. Furthermore, if an addition to the absence of the power to purchase, the city had no appropriation which could be used for purchasing property, that in itself would also render the city unable to attempt in good faith to agree on compensation within the sense of Section 2 of the Eminent Domain Act. In such cases the only course to pursue which I can suggest is to allege in the petition a failure on the part of the city to agree on compensation, and if proof shall be required that an attempt had been made in this regard, the city could only answer by setting up its inability to comply with the provision.

It may be that when the question is clearly presented to the Supreme Court the case of *Chicago & Northwestern Railroad Co. v. City of Chicago*, 148 Ill. 141, *supra*, may be overruled. As the law now stands, however, there is nothing for the city to do but to follow the case of *Village of Norris v. Lyon*, 251 Ill. 457.

In answer to the second question as to whether the right to condemn is affected by the fact that the city council has appropriated \$250,000 for acquiring sites, etc., conditioned upon the approval by the voters of the City of Chicago of an order authorizing the issuance of bonds in that amount, I would say that in my opinion this would not affect the city's right to condemn under the Eminent Domain Act. The appropriation could be used to pay for the land after it is acquired by the proposed condemnation proceedings, and it is also necessary, as above stated, to enable the city to attempt to agree on compensation before the filing of the petition, but

it does not in any view preclude the City from exercising its power of Eminent Domain.

Very respectfully submitted,

FRANK JOHNSTON, JR.,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

PHILIP J. McKENNA,
Attorney for the Board of Local Improvements.

MAY 17, 1912.

HON. JAMES DONAHOE, Chairman, Committee on Judiciary,
State Legislation, Elections and Rules.

Dear Sir:

You forwarded to this department a communication addressed to you by the Mayor, to which was attached a letter from Mr. Thomas I. Tracey, with reference to the status of Chicago policemen as officers, in which the Mayor states that the same outlines a subject of interest to your committee for State legislation.

You also forwarded to us a letter from the State's Attorney to the Mayor and the City Council, in which attention is called to the fact that employes of the Building Department cannot be prosecuted under any bribery statute at present in force. The State's Attorney further says that on his suggestion the City Council passed an ordinance creating the office of patrolman, thereby making "officers" of the patrolmen now in the employ of the city.

Under the Chicago Code of 1911, all police officers of whatever rank and grade are designated as "officers." The letter of Mr. Tracey, above referred to, states that one of the assistant state's attorneys told the last Grand Jury that "owing to a technical defect in the Chicago ordinances establishing the Chicago Police Force, it is impossible to secure a conviction in the case of bribery or attempt at bribery of a Chicago policeman unless that policeman be a ranking officer of the police force." While there is a distinction between the official status of the General Superintendent of Police

and all other officers in that department, we are unable to understand the distinction between a patrolman and a ranking officer above alluded to. We tried to get in touch with the Assistant's State's Attorney credited with that statement but were unable to do so up to the present time.

It will also be seen that the Assistant Sttaa's Attorney is at variance with the State's Attorney on this point. This may be due to the fact that the ordinance, as it now appears in the Code, was not called to his attention.

There is considerable doubt as to whether, by simply designating places as offices, persons holding such positions are brought within the terms of the criminal statutes if they accept bribes. In any case in which a public officer accepts a bribe, section 31 of the Criminal Code can be invoked. Municipal officers can also be prosecuted under section 8 of article VI of the Cities and Villages Act, and sometimes under the act relating to fraudulent and corrupt practices of officers (Chapter 102). In none of these is a city employe, who is not an "officer," included.

In altering the Code so as to make all members of the police force come within the terms of the statute as "officers," the City Council failed to follow the method prescribed for creating appointive offices outlined by section 2 of article VI of the Cities and Villages Act. This requires that such officers shall be appointed by the Mayor with the approval of the City Council.

The point that an inspector of police was not an "officer" was discussed by our Supreme Court in the case of *People v. McCann*, 247 Ill. 130. In that case it was held that McCann was never appointed to the office in the manner authorized by law and never was, in fact, a *de jure* officer, but that the ordinance had created the office and he, by filling the position, became a *de facto* officer. The following is the language of the court:

"The power to appoint persons to fill offices established by ordinance is vested by the statute in the mayor with the approval of the city council, and could not lawfully be delegated to another officer. (*Bullis v. City of Chicago*, 235 Ill. 472.) The city council may, by ordinance, create offices, but they must be filled by the au-

thority and in the manner prescribed by the statute. (*Moon v. Mayor*, 214 Ill. 40.) It follows that as plaintiff in error was never elected inspector of police and was never appointed to said office in any manner authorized by law, he never was, in fact, a *de jure* officer. We do not, however, think this a controlling question in determining the sufficiency of the indictment. If plaintiff in error was seeking to establish his title, or some right depending upon a valid title, to the office of police inspector, he would be required to show that he is a *de jure* officer. (*Stott v. City of Chicago*, 205 Ill. 281; *McNeill v. City of Chicago*, 212 *id.* 481; *Bullis v. City of Chicago*, *supra*; *Moon v. Mayor*, *supra*.) But, as between himself and third parties (the State in this case), if the office of inspector of police of the City of Chicago had a legal existence and plaintiff in error assumed the duties and discharged the powers and functions of the office he became a *de facto* officer, and cannot be permitted to deny his responsibility, while so acting, on the ground that he was not legally elected or appointed to said office. We are of opinion the ordinance pleaded did create the office of inspector of police." (*People v. McCann*, 247 Ill. 130-143.)

You will observe that, while the Supreme Court decided in the above case that a prosecution could be maintained under such circumstances, still there is such a nice question of law involved that a different result may attend future prosecutions.

It is proposed now to make the assistants of the Building Commissioner city officers, and the writer drafted an ordinance, which you have under consideration, which follows in effect the provisions of the Code with relation to police officers. This last ordinance is, of course, subject to the same objection that has been pointed out, although it was drafted on the theory that a prosecution could be maintained.

The whole situation could be remedied by amending section 8 of article VI of the Cities and Villages Act so as to include city employes. A city employe would then be liable to the same penalties for bribery as an officer acting in his official capacity.

Following out of the suggestion of the Mayor to you, therefore, we have prepared a draft of an act amending section 8 of article VI of the Cities and Villages Act, which can

be submitted to your committee with a view to taking action on same and recommending its passage to the Legislature, if you see fit to present it.

We return herewith the letters of the Mayor, Mr. Tracey and the State's Attorney, also the ordinance with relation to Building Department employes. We also forward the draft of the Act, mentioned above, for your consideration.

Respectfully yours,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

MAY 17, 1912.

HON. HENRY ERICSSON, Commissioner of Buildings.

Dear Sir:

Your letter in relation to the construction of an additional building at 2838-42 West 21st street was referred to the writer for an opinion.

The premises in question consist of two adjoining lots, each twenty-five feet in width and one hundred and twenty-seven feet in depth. On the rear of one of these there is an existing two-story tenement house. It is now the intention to build a garage covering the front of the two lots, with a passageway on each side. The proposed garage is to be one story in height. If built according to plans it would leave an open space of only eight feet and one inch between the buildings, contrary to section 439 of the Chicago Code of 1911, which requires fifteen feet. In other respects there is sufficient vacant space on the lot to satisfy the requirements of the Code.

You state in your letter that when the Building Department refused to approve the plans for the garage on account of the above mentioned provision of the Building Code, the argument was made by the owner that he would have a right, under said Code, to connect the two buildings with parallel walls, leave fifty square feet open on the side of these walls, and by calling the open space a light court, he could thus

evade the ordinance; and assuming that he would have that right he asks you to approve the plans as they are, because instead of a fifty foot court between the buildings he would thus leave two hundred square feet of open space. A plat and a letter fully explaining this point and stating that the building was ready for first floor joists when stopped, was submitted by the owner to this department.

Even if it were conceded that he was correct as to his rights in case he built connecting walls, that would furnish no reason for approving plans with no connecting walls. The plans as presented show a plain violation, and no argument of this kind would change the situation.

It frequently happens that parties desiring to build contrary to the ordinances insist that their way is better than that prescribed therein. While this may be true sometimes, it cannot be held that such a change is warranted by that fact. This department has uniformly advised against substituting any one's judgment as to what would be the best method of construction in place of the distinct provisions of the law. No such authority is vested in any officer of the city.

We do not concede, however, that the obstacle would be overcome by constructing the parallel walls above referred to. That is a subterfuge frequently resorted to in the case of two tenement houses on one lot, in order to evade the ordinance, and there is under the Code no way of preventing it. But while this has been successfully done in the case of two tenements, it cannot be countenanced in the case of two buildings of widely differing type, each of which belongs to a distinct class. The buildings would have to be considered separately, and the requirements for each of the two classes would have to be conformed to in each case.

Among the requirements as to one of the classes under consideration here is that providing for the fifteen foot space, which would in any event have to be complied with.

If such a subterfuge were to be permitted and two buildings connected in this way were to be regarded as one building, in the same manner as we are now forced to regard two tenements so connected, it would still be an open question whether the space required under the provisions of section

439 could be dispensed with. Since this is a purely speculative matter, however, we do not feel called upon to discuss that phase of the question. A court would not be likely to hold that two such buildings could be thus converted into one for the purpose of evading the law.

Yours truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

MAY 17, 1912.

HON. EUGENE BLOCK, Chairman, Committee on Local Transportation.

Dear Sir:

Concerning the resolution adopted by the Committee on Local Transportation upon the motion of Alderman Hydahl that

“the Corporation Counsel be requested to furnish this Committee with an opinion in regard to the exact and correct method of procedure for this Committee to follow in order to provide for extension on the north and west sides,”

we beg to reply as follows:

We assume for the purpose of this opinion that the extensions contemplated in the resolution are “compulsory” extensions provided in section 3 of the ordinance of February 11, 1907, of the Chicago Railways Company.

Section 3 of this ordinance (Council Proceedings, page 3139) provides, among other things, that

“at any time after three (3) years from the acceptance of this ordinance the Company shall, upon *the order of the City Council of the city*, construct and equip such additional extensions as may be required by the city and shall operate the same as a part of its system in conformity with the provisions of this ordinance, provided that the Company shall not be obligated hereby to construct and operate any such additional extensions in any street or public way nearer any then existing parallel street railway tracks of the Company than one-half mile and that the Company shall not be obligated hereby to construct more than six miles of double track railway or

twelve miles of single track railway in any one calendar year during the term of this grant."

This section has been slightly modified by section 3 of the ordinance of October 10, 1910 (Council Proceedings, page 1506), where it is provided:

"That the provisions or limitation of said section 3 to the effect that the said Company shall not be obligated to construct and operate any such additional extensions nearer any then existing street railway tracks of said Company than one-half mile, shall not apply to such future extensions."

You will thus observe that in order to secure a new extension, it will be necessary that the City Council formally order such extension to be constructed. As to what such order should contain, we respectfully refer you to a draft of the order we have prepared with reference to the extensions of North Kedzie Avenue from Elston Avenue to Foster Avenue transmitted with the letter addressed to Mr. H. H. Evans, dated April 4, 1912.

Before such an order is passed relative to a compulsory extension, we would advise that the frontage consents covering such extensions be first filed. The frontage consents having been filed and the Company have been ordered by the City Council to construct such an extension, it will then be the duty of the Company to make its public notice in compliance with the statutes. After this has been done, an ordinance should be passed requiring the Company to build the desired extension.

Section 3 of the ordinance of February 11, 1907, does not specify the amount of time that the Company should be given within which to build a particular extension, except that

"the Company shall not be obligated hereby to construct more than six miles of double track railway or twelve miles of single track railway in any one calendar year during the term of this grant."

If the Company completes before the end of the calendar year, it will have fulfilled its ordinance obligations for the particular year. But in this connection we suggest that whenever the Company is ordered to build an extension to constitute part of the extensions for a calendar year, that the

order upon the Company be made at such a time as to afford the Company a reasonable opportunity to complete by the end of the calendar year.

Respectfully yours,

MAX M. KORSHAK,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

MAY 18, 1912.

HON. EDWARD COHEN, City Collector.

Dear Sir:

The question of the right of Lev Bros. to conduct a junk shop at the southeast corner of Western and Wabansia avenues, has again been referred to the writer for an opinion.

This matter came up a short time ago when the application for such license was pending. At that time you sent to this department a communication from the attorneys for this concern and stated in your letter that same was self-explanatory. We, therefore, assumed that it contained a complete statement of the case.

It was shown therein that across the street from the location in question is a hardware store, a saloon, and some private flats, and that aside from these buildings everything was vacant. Basing our opinion on those assertions, we advised you that the license could not be denied, since such places are prohibited only within four hundred feet of any church, hospital, public or parochial school.

In pursuance of said opinion, a license was issued, although the property owners and residents in that neighborhood protested vigorously. Some of these came to see the writer and stated that there was a church across the street from the premises. When we were informed of this we at once notified the attorneys for Lev Bros. that if such was the case the license would have to be revoked as having been improvidently issued under a mistake of fact, if not an outright misrepresentation.

You have now again submitted the matter to this de-

partment and forwarded the report of the license officer, who states that there is in the neighborhood a store used for church purposes. You ask to be advised what action, if any, should be taken by your with reference to the license which has already been issued.

The rights of these parties depend altogether on the definition of the word "church" as used in section 2267 of the Chicago Code of 1911. Said section is as follows:

"2267. JUNK SHOPS AND JUNK YARDS PROHIBITED—WHERE.) No person, firm or corporation shall locate, establish, conduct or maintain any junk shop or junk yard within four hundred feet of any church, hospital, public or parochial school, said distance to be measured by the shortest straight line between the junk shop or junk yard sought to be located, established, conducted or maintained and any such building used for the purpose of a church, hospital, public or parochial school."

The word "church" may be used as signifying a society for religious worship, also as meaning an edifice consecrated to religion. As used in the ordinance, it has reference to the church edifice.

The pastor of the organization meeting in this place states that it is known as the "Gospel Assembly"; that it has existed four or five years; that it is an independent society, not incorporated; that it has been located at its present place of worship about a year; that it is engaged in mission work; and that it leases the premises occupied by it from month to month.

The word "church" has been the subject of many judicial interpretations, more or less conflicting. It was held in *People v. Dalton*, 30 N. Y. Suppl. 407, of a building in which the first floor is used for religious meetings and the rest of the building for offices of directors, physicians and others, the whole constituting a mission, but not connected with any church society, that the same is not a church within the law forbidding the issuance of a license to sell liquors within a certain distance of a building used as a church.

On the other hand, in the case of *In re Zinzow*, 43 N. Y. Suppl. 714, a building occupied by several religious denominations and frequently rented out for meetings was held to be a church.

Again, it was held in *State v. Midgett*, 85 N. C. 538, that there is a distinction between a "church" and "place of worship" which is recognized by law, and that a statute which includes a "church or place appointed for divine worship" is broader than one which relates only to a "church."

In the case of *Howell v. City of Philadelphia*, 8 Phil. 280, where the question involved was whether a church edifice purchased by private parties was within the statute, a church was defined to be a structure which was once dedicated as a regular place of stated religious worship.

Other authorities might be cited showing that the use of the word is involved in more or less doubt. The courts of this state have not passed on same directly, but if the ordinance confined the prohibition to a "church," without any limitation thereon, the weight of authority would seem to be against the persons objecting to the location of the junk yard at this place.

The ordinance, however, goes farther than that, and in the last clause speaks of "any such building used for the purpose of a church." This wording must be construed as including any building which is regularly used for purposes of public divine worship, without regard to its structural character or the fact that the tenure is a renting from month to month.

This being the case, the location of the junk shop on the premises in question is contrary to law, and the license is subject to revocation by the Mayor. The statements contained in the letter of the attorneys, on which you issued the license, were in point of law misrepresentations, although they may not have been intended that way, and may have been a mistake on the part of the writer of said letter.

We return herewith the report of the license officer and the letter of attorneys mentioned above.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

MAY 20, 1912.

TO THE HONORABLE, THE CITY COUNCIL, OF THE CITY OF CHICAGO.

Gentlemen:

May 13, 1912, your Honorable Body passed the following order:

“Ordered, That the Corporation Counsel be and he is hereby directed to take such legal steps as shall be necessary to require the Chicago, Indiana and Louisville Railway Company to stop all their passenger trains at the 63d and Wallace street station for the taking on as well as the letting off of suburban passengers, in accordance with the terms of the franchise ordinance governing the right-of-way traversed by said railway.”

In accordance with the directions thereby given to this Department I have investigated the matter and find that the Chicago, Indianapolis and Louisville Railway Company, also known as the Monon line, which enters the city over the tracks of the Chicago and Western Indiana Railroad Company, as one of the lessees of the latter company, is the railroad in question.

September 15, 1879, the City Council of the City of Chicago passed an ordinance granting to the Chicago and Western Indiana Railroad Company permission to lay down, maintain and operate a railroad with one or more tracks from the then southern limits of the city along its present route, to a terminus between the east bank of the south branch of the Chicago River and State street, and between Sixteenth street and the south line of Van Buren street.

Section 5 of said ordinance provides that said railroad company shall be subject to all general laws, and ordinances of the city in relation to railroads which are now or may hereafter be in force.

Section 7 provides that the privileges authorized by the ordinance are granted upon the express condition that said railroad company shall permit any other railroad companies, not exceeding two in number, to use its main railroad tracks jointly with said company.

November 7, 1879, the trustees of the Town of Lake passed an ordinance amending an ordinance passed October

10, 1879, which grants to the Chicago and Western Indiana Railroad Company the right of way from Auburn to the northern limits of said town.

Section 3 of said ordinance provides that said railroad company may operate said tracks subject at all times to the general ordinances of the Town of Lake, "now in force, or that may hereafter be adopted by the board of trustees."

Section 6 of said ordinance provides among other things, that the privileges granted are upon the express condition:

"That all passenger trains run over said road whether by the Chicago and Western Indiana Railroad Company, its assigns, grantees or lessees, shall stop for the accommodation of passengers at 63d street, in said town of Lake." * * *

Upon annexation of said town to the City of Chicago in 1889, the annexed territory became subject to all ordinances of the city with the exception of those ordinances of the town which prohibited or regulated the sale of intoxicating liquor.

The Chicago Code of 1911 contains no provision by which the stopping of passenger trains at stations within the city is regulated.

The only law directly bearing upon the subject is section 88 of chapter 114, Revised Statutes of Illinois, which provides as follows:

"Every railroad corporation shall cause its passenger trains to stop upon its arrival at each station advertised by such corporation as a place for receiving and discharging passengers, upon and from such trains a sufficient time to receive and let off passengers in safety; provided, all regular passenger trains shall stop a sufficient length of time at the railroad station of county seats to receive and let off passengers with safety; but provided, further, that where three (3) regular passenger trains each way each day are so stopped at the railroad stations of county seats * * * it shall be lawful for not more than two through express or mail passenger trains * * * to pass through the railroad stations of county seats * * * without stopping." (Hurd, 1909.)

The last proviso was added to the statute in 1899, evidently after the courts of the United States had indicated by various decisions that the old statute was an attempt to reg-

ulate interstate commerce and as such, beyond the power of the state.

Section 91 of chapter 114, Revised Statutes, provides that any railroad violating the provisions of this law shall be liable to the person aggrieved for all damages done to person or property by reason thereof, with costs of suit. In addition, the company shall forfeit the sum of not less than \$100 nor more than \$500 for each offense, to be recovered in an action of debt, in the name of the People of the State of Illinois, for the use of the person aggrieved, before any court of competent jurisdiction.

The May, 1912, time-table of said railroad company shows that it is at present operating daily three passenger trains each way between Chicago and Louisville, and three additional trains between Chicago and Indiana points, all of which trains are advertised to stop at 63d street.

The ordinance of the Town of Lake of November 7, 1879, beyond the provision that the company shall be subject to all ordinances of the town, contains nothing in the way of a penalty or forfeiture clause, and unless some person aggrieved should present himself as plaintiff, this department is powerless to act in the premises, until you Honorable Body shall by ordinance provide the necessary means to that end.

Such an ordinance would carry into effect the provisions of the ordinance of the Town of Lake, of November 7, 1879, and would be a valid exercise of the police powers of the city over all railroad companies similarly situated as the one here in question.

Very truly yours,

NICHOLAS MICHELS,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

MAY 21, 1912.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Concerning the right of the various elevated railroad companies to maintain news stands in their elevated stations and to refuse to sell daily papers from such stands, we beg to advise you as follows:

The various elevated railroad companies are incorporated under what is known as the Railroad Act and none of them are authorized by their respective charters to do anything except construct, maintain and operate railroads. We, therefore, advise you that, irrespective of the place where the news stand is located, none of the railroad companies have any right or authority to conduct such business and such business is, therefore, *ultra vires* each of the elevated railroad companies.

But, aside from the question of power, there is involved in every instance of a news stand in the loop and in many instances of news stands at stations outside of the loop, the question of the right of the elevated railroad company in each instance to occupy the street for the purpose of conducting therein such news stand. An examination of the right of way ordinances of the various railroad companies discloses that in no instance has the City granted to an elevated railroad company the right to occupy the public streets for the purpose of conducting therein a news stand, and we, therefore, advise you that, insofar as the elevated stations of the various elevated railroad companies are situated within street lines, said railroad companies have no right to devote any portion of such elevated stations to the conduct of news stands therein.

It is a proposition too clear to admit of discussion or permit of the citation of authorities, that in the absence of a grant from the City no person or corporation has any right or authority to conduct any private enterprise therein.

If we were to assume, however, that the elevated railroad companies had the charter power to conduct news stands and had the right to conduct such news stands in their stations situated within the lines of public streets, then such companies would have the right to sell or refuse to sell daily papers as they might see fit, unless there was some provision

in the grant from the City conferring upon them the right to conduct such stands whereby they were required to sell such daily papers.

Very respectfully yours,

CHAS. M. HAFT,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

MAY 21, 1912.

HON. JOHN E. TRAEGER, City Comptroller.

Dear Sir:

Your letter in relation to the right of the city to demand and collect an inspection fee from owners of property for the annual inspection of buildings, to which was attached a communication from James R. Ward, Esq., was referred to the writer for an opinion.

In this case the party affected refuses to pay an inspection fee levied under section 237 of the Chicago Code of 1911, which requires the annual inspection of theaters and places of amusement, worship, instruction or entertainment, and also of all other buildings over two stories in height except residences and except tenements three stories or less in height. The ordinance provided for a fee to be paid for such inspection. It is claimed that there is no statutory authority for the passage of such an ordinance.

There is no express statutory provision for the annual inspection of buildings and the collection of a fee therefor, but this is a power which is a necessary incident to the power granted in clause 63 of section 1, article 5 of the Cities and Villages Act. This clause is as follows:

“To prevent the dangerous construction and condition of chimneys, fireplaces, hearths, stoves, stove-pipes, ovens, boilers, and apparatus used in and about any building and manufactory, and to cause the same to be removed or placed in a safe condition, when considered dangerous; to regulate and prevent the carrying on of manufactories dangerous in causing and prompting (promoting) fires; to prevent the deposit of ashes in unsafe places, and to cause all such buildings and enclosures as may be in a dangerous state to be put in a safe condition.”

In order to effectively exercise the power given under the above clause, which not only confers authority but imposes a duty, it is necessary to make periodical inspections. It follows, as a matter of course, that the parties for whose benefit the inspection is made, can be required to pay the reasonable cost of same. The power conferred is regulative in its nature and license and inspection fees are included in the power to regulate.

Dillon on Mun. Corp., 5th Ed., Secs. 303-5.

Spiegler v. City of Chicago, 216 Ill. 114.

New Orleans v. Hop Lee, 104 La. 601.

The imposition of a reasonable inspection fee is not a tax, and is usually regarded as compensation for the benefit conferred by such inspection.

“Inspection laws are not regarded as imposing burdens upon trade, nor as unjustly discriminating in favor of one class at the expense of another, so long as they are reasonable.”

People v. Harper, 91 Ill. 357.

C., W. & V. Coal Co. v. People, 181 Ill. 270.

In *City of Chicago v. Burke*, 226 Ill. 191, our Supreme Court stated that the power to provide for the inspection of oil as an article of merchandise existed under clause 54 of section 1, article 5 of the General Incorporation Act, intimating that a fee could be charged thereunder. By referring to this clause we find that the power is given therein to regulate the inspection of merchandise. No greater regulative power is conferred thereby than is conferred under the clause above quoted.

The inspection fee provided by ordinance for the annual inspection of the buildings mentioned is no more than necessary to cover the expense of same, and it cannot be assailed as unreasonable. The authority of the city to collect same is, therefore, complete.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

MAY 21, 1912.

HON. EUGENE BLOCK, Chairman, Committee on Local Transportation.

Dear Sir:

In the communication of April 27, 1912, of H. H. Evans, Secretary of your committee, a request is made of this department to furnish your committee with the proper draft of orders or ordinances by the passing of which the City may compel the Chicago Railways Company to begin immediate construction of the remaining extensions which the Company is obligated to construct under the ordinances of October 10, 1910.

These extensions are set out in the head of "Exhibit 1" under the heading of "Additional Extensions" (C. P. October 10, 1910, page 1510) and are specified in section 2, paragraph a (C. P. October 10, 1910, page 1504) and are to be "fully equipped and in operation on or before the first day of December, 1911."

You have suggested that this department make a report on the Harrison Street extension by the next meeting of your committee, if possible. In this opinion, therefore, we shall take up the consideration of Harrison Street extension *only*. The other extensions will be treated in later communications.

As suggested above, this extension was to be "fully equipped and in operation" on or before the first day of December, 1911. The fact that a year and a half has gone by since this last mentioned date does not release the Company from the obligation to build, for it has been expressly held that the City Council has the right and power to waive the conditions as to time for completion, it being a provision in favor of the City to secure the public interests. The grant being a mere license, the City may waive a strict performance of the condition.

Chicago City Railway Company v. People of the State of Illinois ex rel., Story 73, Ill. 541.

Clause 90 of chapter 24 of Hurd's Revised Statutes of Illinois, 1909, provides that the

"City Council * * * shall have no power to grant the use of or the right to lay down railroad tracks in

any street of the City * * * except upon the petition of the owners of the land representing more than one-half of the frontage of the street or so much thereof as is sought to be used for railroad purposes. * * *"

Our investigation discloses the fact that on October 10, 1910, at which time the ordinance was passed, no frontage consents were on file.

Since the consent of abutting property owners, when required by the statute, is a condition precedent to occupy streets, the Company has no power to lay tracks even if it should desire to do so.

North Chicago Street Railway Company v. Cheetham,
58 Ill. App. 310, 318.

Wiggins Ferry v. East St. Louis Railway Company,
107 Ill. 450.

Attorney General v. Chicago Horse & Dummy R. R. Company, 121 Ill. 638.

In order to grant valid track rights in Harrison Street, therefore, a new ordinance must first be passed based upon the filing of frontage consents and all other conditions in compliance with our statute.

The ordinance of October 10, 1910, has been drawn subject to all of the "provisions, conditions, requirements and limitations" of the ordinance of February 11, 1907.

(Section 1 ordinance October 10, 1910, C. P. page 1502.

Section 2 ordinance October 10, 1910, sub-paragraph a,
C. P. page 1504.

Section 8 ordinance October 10, 1910, C. P. page 1507.)

The ordinance of October 10, 1910, contemplated that frontage consents would have to be filed and a new ordinance passed, for in the ordinance of February 11, 1907, the conditions and requirements of which the ordinance of October 10, 1911, is subject to, there is an express provision (section 3 ordinance February 11, 1907, C. P. 3130) that

"The Company shall not be authorized or obligated to construct any extension of its street railway system upon streets on which street railways are not located when this ordinance goes into effect until the City has granted to the Company whatever authority, in addition to this ordinance, may be necessary to comply with the frontage consent laws of the State of Illinois."

Since the Company is not obligated, by virtue of the above, to build the Harrison Street extension until the City has granted to the Company whatever authority, in addition to the ordinance, that is necessary to comply with the "frontage consent laws of the State of Illinois," it will be necessary to file frontage consents covering the Harrison Street extension before a new ordinance is passed and the Company cannot be compelled to build this extension until this is done.

This extension, as you will note, is on "Harrison Street from South 40th Avenue to the present city limits (60th Avenue)."

Our investigation further discloses a verification report showing a sufficiency of frontage consents on Harrison Street from *Fortieth Avenue to Forty-eighth Avenue only* (C. P. April 4, 1912, page 3279). It was probably deemed unnecessary to file frontage consents for the rest of the extension, to wit: between 48th Avenue and 60th Avenue, for the reason that the Suburban Railroad Company was operating a street car line on this stretch.

Whether an ordinance covering the extension between 40th Avenue and 60th Avenue would be valid when based on frontage consents from 40th Avenue to 48th Avenue *only*, is a question which is not free from doubt.

The so-called Mueller law (Hurd's Revised Statutes of 1908, page 460) provides, among other things:

"* * * and it shall be lawful for the City Council of any city to make a grant containing such a reservation for either the construction or operation or both the construction and operation of a street railway in, upon and along any of the streets or public ways thereon or portions thereof in which street railway tracks are already located at the time of the making of such grant *without the petition or consent of any of the owners of the land abutting or fronting upon any street or public way or portion thereof covered by such grant.*"

It would seem from a reading of the entire paragraph that the provision that it shall be lawful to make a grant upon streets in which street railway tracks are already located *without the petition or consent of any of the owners of land* is a provision which applies to municipalities *only* in the interest of municipal ownership and operation, and has no appli-

cation to a grant made to a public service corporation, yet in the case of *Venner v. Chicago City Railway Company*, 236 Ill. 349, where the question was raised that no frontage consents preceded the passage of the ordinance of February 11, 1907, the court held that the Mueller law *did* apply and that the securing of new frontage consents was not necessary.

The situation with respect to the Harrison Street extension is somewhat different, since another company is now operating on part of the line and the grant to the Chicago Railways Company of the right to operate on Harrison Street would be a grant to a second company, the effect of which would be that two companies would operate on Harrison Street instead of one.

This was the view of the court in the case of the *Colonial City Traction Company v. The Kingston City Railroad Company*, 153 N. Y. 540, where this specific question was involved. The court in this case discusses the question fully and concludes that the fact that one street surface railroad company has the consent of both local authorities and abutting owners to build and operate a railroad through a street does not relieve a second company from the necessity of obtaining further consents from both of those sources to enable it to use the tracks of the first. The court says on page 549 :

"It is further insisted that where one company has the consent of both local authorities and abutting owners to build and operate a railroad through a street, no further consent from either of those sources is necessary to enable a second company to use the tracks of the first, and hence that neither the Constitution nor statute applies to the case at hand.

The consent required is not simply to the laying of the tracks, but also to the operation of the road. When the municipal authorities consented that the respondent might operate its road through Broadway, they did not consent that another company might operate a distinct and independent line through that street. The operation of one railroad might cause so slight an interference with the use of the street as not to seriously impair its usefulness, whereas, if two or more railroads were permitted to operate their lines through the street, it might virtually destroy it for the ordinary purposes of a highway."

And further on, on page 549, the court says:

“So an abutting owner might be willing to permit one company to operate its line through the street in front of his property, which would involve the passage of but three or four cars an hour, but not be willing that several companies should have that privilege, which might involve the passage of a car every two minutes. It is not the laying of tracks but the running of cars that constitutes the chief burden both upon the street and the property of the abutting owners. Consent to the burden of one road should, in reason, be limited to that road with whatever increase of business it may have, but should not be extended to as many roads as can crowd their cars into operation upon the street. It would be an unreasonable construction to hold that this is what the public authorities or the private citizens intend when they consent to the building and operation of a street railroad. Instead of an advantage to the public, or to those owning property on the street, which is the inducement to obtain consent, it might result in a heavy and unexpected burden upon both, without any power to prevent it, and yet with no intention to consent to it. It would be a perversion of the consent given by extending it far beyond the intention of the parties.”

And further on, on page 551 the court says:

“We think that when consent is given either in behalf of the public, or the abutting owners, to one company, it is for its own use and not for the use of an indefinite number of other companies, regardless of the interests of the city or of the owners of property on the street.”

Whether under such circumstances, therefore, the court would hold that the decision in the Venner case applied is a question upon which we are not free from considerable doubt.

It is our opinion, therefore, that new frontage consents for the *entire extension*, to wit: on Harrison Street from 40th to 60th Avenues be obtained and that the present consents from 40th Avenue to 48th Avenue should be disregarded.

Should this be done, then unquestionably the City will have fulfill its ordinance obligation to grant whatever authority in addition to the ordinance which “may be necessary to comply with the frontage consent laws of the State of Illinois”; should the Chicago Railways Company then fail

to take all necessary steps and construct such extension upon the order of the City Council by a certain reasonable time designated in such order, the City would then have the right to invoke the forfeiture provisions contained in section 32 of the ordinance of February 11, 1907.

By reason of the conclusion herein reached as to the necessity of further frontage consents, we have not prepared at this time drafts of orders requiring the Chicago Railways Company to proceed to take all necessary steps to build the Harrison Street extension, because such orders would be in the existing situation premature. We shall do so upon further instruction from your committee should you desire it to be done after the compliance with the frontage consent laws of the State.

Respectfully submitted,

JOHN W. BECKWITH,

MAX M. KORSHAK,

Assistants Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

MAY 22, 1912.

HON. EUGENE BLOCK, Chairman of Committee on Local Transportation.

Dear Sir:

I have before me the order which was introduced in the City Council by Alderman Thomson on April 29, 1912, which is as follows:

“Ordered, that the Committee on Local Transportation take up the matter of half-rate on the transportation lines of the city for children going to and from the public schools, and take such steps as may bring about such a fare, if possible.”

Your communication requests an opinion as to the city's powers in respect to bring about such a half-rate fare by means of action on the part of the City Council. I would consider the subject, first, with reference to whether such an establishment of half-rate fares would be repugnant to the provisions of the “settlement” ordinances granting rights

to the traction companies and passed February 11, 1907, and, second, whether the city has the inherent power to pass an ordinance of the character contemplated.

Section 11 of an ordinance to the Chicago Railways Company, passed February 11, 1907, provides in regard to rates of fare as follows:

“For a continuous trip in one general direction, within the present or future limits of the city, over its street railways covered by this ordinance and all extensions thereof (whether owned, leased or operated by it) the sum of five cents (5c) for each passenger twelve years of age or over, and three cents (3c) for each passenger under twelve (12) years of age; provided that children under seven (7) years of age accompanied by a person paying fare shall be permitted to ride free.”

An ordinance following the ideas contained in the order hereinabove referred to would modify this section by reducing the rate of fare to be charged passengers over twelve years of age if such person were a child going to or from a public school, and would also modify the rate of fare to be charged for passengers between the ages of twelve and seven years if such passenger were a child in attendance upon public schools of the city and using the street car transportation of the company.

It was evidently within the contemplation of the framers of this ordinance that the rates of fare therein established should not be unalterable and to meet the contingency calling for a revision of passenger tariffs there was inserted in the ordinance a provision under section 25 which provides as follows:

“It is understood and agreed that the company’s agreement and obligation to pay the city the fifty-five (55) per cent. of the “net receipts,” as hereinabove provided is based upon its right to charge and receive the fares prescribed in Section 11 hereof and to retain as its own the forty-five (45) per cent. of the “net receipts” as hereinabove in this section provided. The said city, however, reserves the right to, and it may at any time commute a sum not exceeding the city’s share of the net receipts for the previous year into a reduction of said rates of fare; and thereafter in the event of such reduction of rates of fare the company may deduct and re-

tain as its share of the net receipts each year an amount equal to what would have been the company's share of the net receipts of such year had the passengers carried during such year paid the fares prescribed in this ordinance, but the company, after deducting and retaining its share of said net receipts so determined, shall pay over to the said city the remainder, if any, of the net receipts for such year less the deductions therefrom hereinbefore provided to be made from the said city's share of the "net receipts" on account of license fees."

Sections 11 and 24 of an ordinance to the Chicago City Railway Company, passed on the same day, contain similar provisions as to rates of fare and commutation of fares. Under these provisions it will be seen that any reduction of fares on the part of the company, at the demand of the city, will result in the net receipts of the city (55 per cent.) being reduced proportionately to the amount of loss entailed by such reduction in the company's share of the receipts; to put it otherwise, if the city occasions a reduction of fares it must bear the loss occasioned by such reduction through a diminution of its 55 per cent. of the net receipts. The proposition of whether such a course would be advisable is one of policy concerning which this department is not authorized under the present circumstances to express an opinion.

The second question for consideration is one of the power of the city to enact an ordinance granting the privilege to children over seven years of age attending public schools in the city to use the street car lines of the city for a half-fare. The privilege thus granted would inure to pupils of public schools alone and could not be availed of by children over seven years of age attending non-public schools.

It is apparent in the first instance that a valuable privilege would thus be conferred upon a certain class of children of the community and could not be enjoyed by other children not similarly circumstanced, that is those children not attending public schools or attending schools non-public in their character. A discrimination would thus be created against all children over seven years of age who did not happen to be in attendance upon the public schools of the city. Discriminations of this kind between individuals of a class are not favored in law.

In the case of *Tugman v. City*, 78 Ill. page 405, it is said, concerning an ordinance granting a right to certain persons to engage in business within a designated district:

“A regulation of this character, to be binding upon the citizen, must not only be general, but it should be uniform in its operation. * * * Each member of a municipal corporation is required to share the burdens incident to such an organization; but, at the same time, all are entitled to share and participate equally in all benefits to be derived from such a government.”

In the case of *City of Chicago v. Rumpff*, 45 Ill., page 90, in speaking of the power of the Council to limit the district in which the business of slaughtering might be conducted, it is said:

“All by-laws should be general in their operation, and should bear equally upon all of the inhabitants of the municipality. Where privileges are granted by an ordinance, they should be open to the enjoyment of all upon the same terms and conditions.”

We can see no equality in an ordinance which would prescribe a two and one-half cent ($2\frac{1}{2}$ c) fare for a public school child of fifteen years but would deny such reduced rate to a working child or child attending a parochial or private school.

In a communication upon the same subject from the Chairman of the School Committee of the Women's City Club, it is said:

“Of the Chicago children leaving grammar school each year only about eight per cent. ever go to high school. Of the remainder, representing about 23,000, several thousand at least would be enabled to avail themselves of the two year vocational course now offered in our public high schools if half-rate fares were in effect.”

Assuming this statement to be approximately correct it appears that ninety per cent. of the public school children of Chicago cease attendance upon the public schools after graduation from grammar school. It is common knowledge that the age of such graduation of children is from twelve to fourteen years. Admitting that many of these would continue in the public schools were half-rate fares furnished for transportations, the presumption may be indulged in that many thousands of these children would be cut off from the benefit

of the half-rate public school fare on leaving grammar school merely by reason of the fact that they ceased attending a public school.

The children, therefore, who were fortunate enough to continue in the public schools would be given a privilege of half-rate fare while the less fortunate companions who were unable, from whatever cause, to continue their educational course, would be deprived of this reduced rate.

The situation of the minor child who is compelled to support itself, or contribute to the support of its family, would seem to be sufficient onerous without the imposition of the additional hardship of compelling such an one to pay full fare upon the street cars while those children who were able to attend school were given a half-rate.

Mr. McQuillin in his work on the laws of Municipal Ordinances, in laying down the rule that discrimination in street car rates by city ordinances is forbidden, says:

“Section 589. DISCRIMINATION IN STREET CAR RATES FORBIDDEN. The rule elsewhere stated and illustrated which forbids discriminations in municipal legislation, has been applied to ordinances regulating the rates of street car fare. * * * Ordinances of this character must have an uniform operation. If they give residents of the city the special privilege of obtaining transportation at a less rate than other residents of the state they will be declared unconstitutional.”

The rule as laid down by this author is followed in the case of the *Lake Shore & Michigan Southern Railway Company v. Smith*, 173 U. S. Rep., page 684. There was under consideration in this case the power of the state to pass an act compelling railway companies to sell one thousand mile tickets to persons and their families at a certain rate which was below the rate charged to other persons purchasing ordinary railways transportation. The constitutionality of the act was challenged by the railway company.

The court in declaring the law unconstitutional say:

“It is stated upon the part of the defendant in error that the act is a mere regulation of the public business, which the legislature has a right to regulate, and its apparent object is to promote the convenience of persons having occasion to travel on railroads and to reduce for

them the cost of transportation; that its benefit to the public who are compelled to patronize railroads is unquestioned; that it brings the reduction of rates of two cents per mile within the reach of all persons who may have occasion to make only infrequent trips; and that there is no reason why the legislature may not fix the period of time within which the holder of the ticket shall be compelled to use it. The reduction of rates in favor of those purchasing this kind of ticket is thus justified by the reasons stated.

The right to claim from the company transportation at reduced rates by purchasing a certain amount of tickets is classed as a convenience. As so defined it would be more convenient if the right could be claimed without any compensation whatever. But such a right is not a convenience at all within the meaning of the term as used in relation to the subject of furnishing conveniences to the public. And also the convenience which the legislature is to protect is not the convenience of a small portion only of the persons who may travel on the road, while refusing such alleged convenience to all others, nor is the right to obtain tickets for less than the general and otherwise lawful rate to be properly described as a convenience. If that were true, the granting of the right to some portion of the public to ride free on all trains and at all times might be so described. What is covered by the word 'convenience,' it might be difficult to define for all cases, but we think it does not cover this case. An opportunity to purchase a thousand-mile ticket for less than the standard rate we think is improperly described as a convenience.

The power of the legislature to enact general laws regarding a company and its affairs does not include the power to compel it to make an exception in favor of some particular class in the community and to carry the members of that class at a less sum than it has the right to charge for those who are not fortunate enough to be members thereof. This is not reasonable regulation.

* * * If the general power exist, then the legislature can direct the company to charge smaller rates for clergymen or doctors, for lawyers or farmers or school teachers, for excursions, for church conventions, political conventions, or for all or any of the various bodies that might desire to ride at any particular time or to any particular place.

If the legislature can interfere by directing the sale of tickets at less than the generally established rate, it

can compel the company to carry certain persons or classes free.

The legislature having fixed a maximum rate at what must be presumed, *prima facie*, to be also a reasonable rate, we think the company then has the right to insist that all persons shall be compelled to pay alike, that no discrimination against it in favor of certain classes of married men or families, excursionists or others, shall be made by the legislature."

It will be noted in this case that the argument is directed against the power of the state to decrease the railroad earnings by such discriminatory legislation, but the reasoning upon the subject leads to the conclusion that any legislation, state or municipal, which attempts to confer privileges upon certain members of a class, viz., school children, while it denies such privilege to those who do not attend *public* schools, must in its nature come under the constitutional prohibition against legislation which denies all persons equal protection of the laws.

An ordinance drawn upon the lines suggested in the order of the Council, passed April 29, 1912, would in our opinion, be invalid.

Yours respectfully,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

MAY 23, 1912.

HON. HENRY ERICSSON, Commissioner of Buildings.

Dear Sir:

Your referred to this department the protest of property owners in the vicinity of 1730 North Fortieth Avenue, where a permit to construct a warehouse has been issued to P. J. King.

From your letter, it appears that it is proposed to face the building in question on Fortieth Avenue between Bloomington Road and Wabansia Avenue. You state that this neighborhood is at present occupied exclusively by residences; that the protesting property owners claim the proposed build-

ing is to be used as a planing mill, and ask to have the construction stopped on the theory that same is a machine shop within the terms of section 712, as amended on March 11, 1912 (Council Proceeding 3171).

There is no warrant in law for assuming that the building for which a permit has been taken out will be used for any other purpose than that stated in the application; any other assumption at this time would be purely hypothetical, unless the party who made the application, or his agent, admitted it to be a fact. Aside from this, however, we find nothing in section 712, as amended, which would permit you to stop the construction, even if it was contemplated to build a planing mill on the premises. The statutes do not empower the municipality to control the location of planing mills, nor is it within the power of the city to place any restriction on the location of such a place on the theory that it is a factory. Aside from a few exceptions, no power is given to control the location of factories. The provision in the ordinance, which restricts the location of a factory combined with a foundry, is authorized only under the power to control the location of foundries.

A planing mill is not a machine shop in the general acceptance of the term. It could only be construed as a machine shop on the theory that all places which run machines are machine shops. This is not a proper interpretation to be placed on the words. (*Hoskin v. Woodward*, 45 Pa. 42; *Godard v. Monitor M. F. Ins. Co.*, 108 Mass. 56.)

You have, therefore, no authority to stop the construction of the building, nor to require frontage consents.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

MAY 27, 1912.

HON. EDWARD COHEN, City Collector.

Dear Sir:

Replying to your request of May 22d for an opinion relative to the fireworks ordinance (C. P. July 17, 1911, p. 1061), we beg to advise you that said ordinance confers authority upon the Mayor to issue a permit upon application for a public display of fireworks, the evident intent of the ordinance being to limit the number of displays of fireworks and make it impossible for individuals to display fireworks for private as distinguished from public entertainments.

If a person desires to give a public display of fireworks, he shall make application to the Mayor in writing, giving his name, place of residence and age, together with the place at which it is proposed to give such public display of fireworks, and shall state what experience, if any, the applicant has had in the discharge of fireworks and whether he is possessed of all the usual normal mental and physical faculties. This application must be sworn to before a Notary Public and upon its presentation to the Mayor, it is his duty to refer it to the Chief of the Fire Department, whose duty it then becomes to make an inspection of the locality where it is proposed to give such public display of fireworks, and, if in the judgment of the Chief of the Fire Department, it would not be hazardous to the surrounding property, or dangerous to any person or persons to permit such public display of fireworks, he shall return the application to the Mayor with his approval.

If it appears that the applicant is a man of legal age, who has had experience in the discharge of fireworks and he is in possession of all the usual normal, mental and physical faculties, it is the duty of the Mayor to issue a permit in writing to the applicant, upon the payment of a permit fee of \$10.00, giving such applicant permission to conduct such public display of fireworks. The permit shall designate the kinds and quantities of fireworks to be used at such public display and no other kinds or no greater quantities of fireworks than designated in the permit shall be used in such public display.

The evident object of the provisions last above referred

to is to put it within the supervisory power of the Chief of the Fire Department to approve the experience and physical and mental qualities of the person who is to give the display and of the propriety of the locality where it is to be given.

Yours respectfully,

CHAS. M. HAFT,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Acting Corporation Counsel.

MAY 27, 1912.

HON. JAMES DONAHOE, Chairman, Committee on Judiciary,
State Legislation, Elections and Rules.

Dear Sir:

In response to the request made by your committee, in open meeting at its last session, regarding the power of the city to control the location of the place of business of a wholesale dealer in junk, we beg leave to submit the following:

This question came up when you were considering the ordinance recently drafted in this department requiring frontage consents for the location of junk shops and junk yards in residential neighborhoods. The opinion was asked for in order to ascertain whether the City Council had a right to include wholesale dealers in junk within its terms.

Prior to the amendment of June 5, 1911, the power of the municipality over junk shops, as contained in clause 95 of section 1 of article 5 of the Cities and Villages Act, was as follows:

“To tax, license and regulate second-hand and junk stores, and to forbid their purchasing or receiving from minors, without the written consent of their parents or guardians, any article whatsoever.”

The statute uses the expression “junk stores.” Such places are ordinarily, however, called “junk shops.” The word “shop” and “store” are frequently used interchangeably to designate a retail business. No power to control the location of a junk store or junk shop was given by the above statute. The city undertook by ordinance to restrict the loca-

tion of junk shops, while this statute was still in force, but our Supreme Court, in the case of *People ex rel. Goldberg v. Busse*, 240 Ill. 338, held that the authority to "tax, license and regulate" such a business did not include the power to control its location. Hence, under that clause, as it existed before the recent amendment, the city had no control over the location of either a wholesale or retail junk business.

The city did, however, have power to license junk stores or junk shops; and an ordinance was passed requiring a license for "junk shops." Under this ordinance the city officials demanded license fees from wholesale dealers in junk.

The right of the city to collect a license fee from wholesale dealers in junk was contested and it was decided, in the case of *City of Chicago v. Lowenthal*, 242 Ill. 404, that a wholesale junk business was not a junk shop within the meaning of the ordinance. In its decision the court repeatedly speaks of a "wholesale dealer in junk."

Both of these decisions were rendered before the act of June 5, 1911, so that the Legislature had knowledge of the definition of "junk shop" by the Supreme Court and also its attitude with regard to regulating and controlling the location of junk shops and junk businesses, both wholesale and retail.

At that time clause 95 of the section of the act was amended, obviously for the express purpose of meeting the difficulty created by these decisions, so as to read as follows:

"To tax, license and regulate second-hand and junk stores and yards, and to forbid their purchasing or receiving from minors without the written consent of their parents or guardians, any article whatsoever, and to direct the location thereof."

You will observe that the Legislature, in amending the act, included yards along with junk stores, and authorized the city to direct the location of same. While the statute was broadened so as to include junk yards, whether wholesale or retail, it cannot be presumed that the intention in so altering the clause was to include wholesale junk dealers.

In other words, the statute recognized the necessity of regulating "junk shops" in order to guard against the unlawful disposition of stolen property, and it also recognized the necessity of regulating and controlling the location of

"junk yards," as well as these retail places, for sanitary reasons, but it did not regard it as necessary to regulate or to restrict the location of a wholesale junk business where it is carried on entirely under cover.

The reasonable interpretation of the statute as it now stands, therefore, appears to be that junk shops, which are defined in the Lowenthal case as retail places, may be taxed, licensed and regulated, and the location of same can be controlled; also that yards in which junk may be kept, whether the same is bought and sold at wholesale or retail, may be likewise taxed, licensed, regulated and restricted as to location.

Consequently, the ordinance as prepared and recommended by your committee, which undertakes to control the location of junk shops and junk yards, goes as far as the statute will permit. It would be fruitless to attempt to pass an ordinance which undertook to control the location of wholesale junk businesses where they carry on their entire business on the inside of a building.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Acting Corporation Counsel.

MAY 29, 1912.

HON. JAMES DONAHOE, Chairman Committee on Judiciary,
State Legislation, Election and Rules.

Dear Sir:

At the last meeting of your Committee, a request was made for an opinion from the Corporation Counsel on the validity of section 815 of the Chicago Code of 1911, under which a contest on the election of an alderman may be brought within sixty days after such election.

The question was raised by reason of the fact that a statement in writing was filed by William Francis Schofield, Esq., contesting the right of Alderman James F. Burns to hold the office of alderman of the Twenty-first Ward.

This statement was filed more than thirty days after the election, although the sixty days prescribed by section 815 had not elapsed. Said section reads as follows:

“815. Verified statement of points.) When any elector shall desire to contest the right of another to hold the office of alderman, he shall, within sixty days after the election, file with the city clerk a statement in writing, briefly setting forth the points on which he will contest the election, which statement shall be verified by affidavit.”

The point made before your Committee that the above section of the ordinance is contrary to the statute of the State, because section 113 of the General Election Law requires that persons desiring to contest the election of certain officers at an election held under said Act, must file with the clerk of the proper court, within thirty days after the person whose election is contested is declared elected, a statement in writing setting forth the points on which they will contest the election.

The section of the statute which is invoked is not applicable to the case. The election for aldermen was held under the Cities and Villages Act, which was originally passed at the same session of the legislature at which the General Election Law was enacted; although in point of time it was enacted a few days later than the Election Law.

There appears to have been no amendment to the sections of the Election Law on which the parties who make the point rely, consequently if there was a conflict in the provisions of the two Acts, the Cities and Villages Act would control.

There is in fact, however, no conflict whatever. The General Election Act has been repeatedly held to apply only to those offices which were either expressly mentioned therein or similar offices.

That Act provides for a contest of elections in the courts and specifies the different courts in which such action must be brought.

In passing on the right of the County Court to decide a contest over the election of a president of an incorporated town, our Supreme Court used the following language:

“In *Brush v. Lemma*, 77 Ill. 496, which was a proceeding to contest the election of the mayor of the City of

Carbondale, we held the expression 'all other officers,' found in said section 98 of the Election law, referred only to officers of the like grade or class enumerated in the first branch of the section, namely, county, township and precinct officers, and that an incorporated city, town or village was a corporation of an entirely different class from corporations created by the State for the purpose of aiding in the affairs of the general government, such as counties, townships and precincts, and that county courts were without jurisdiction to hear and determine the contest of the election of the mayor of the city." (*King v. Jordan*, 198 Ill. 459.)

It will thus be seen that the courts have recognized at all times that elections held under the Cities and Villages Act have been on a different footing altogether from those held under the General Election Law.

The only reference to the General Election Law contained in the Cities and Villages Act is in that portion of the article on elections which says that the manner of conducting and voting at elections and contesting the same shall be the same as nearly as may be as in the case of the election of county officers.

The particular section of the Act, however, under which section 815 of the Code was enacted is section 6 of article 3, which says that,

"the City Council shall be judge of the election and qualifications of its own members."

Under this section of the statute the City Council has seen fit to fix the time within which contests may be brought at sixty days. The City Council clearly has the right to do this.

This section of the statute gives the City Council power over its own membership commensurate with that given by the constitution to the legislature to judge of the election of its members.

Marshall v. People, 40 Ill. App. 102.

This right has never been successfully assailed. Under a similar ordinance the City of Evanston, it was held in *City of Evanston v. Carroll*, 92 Ill. App. 506, that such contest was properly brought.

It is true that the question of time was not raised in

just the same way in that case, but nevertheless the contest was filed more than thirty days after the election. The court said on this point:

"The claim of appellees that the action of the city council in hearing and determining the contest of Mr. Carroll's election was void, because he had, on the first day of May, 1900, been found by the council to have been duly and legally elected to the office of alderman, is not tenable. The statute of this State (Hurd, Chap. 46, Pars. 112 and 113) clearly contemplates that a contest shall not be allowed until after the result of the election shall have been declared, and the ordinances of the City of Evanston provide that contests shall be in accordance with the general laws of the State regulating the mode of contesting elections for county officers, so far as the same may be applicable, and that a contest may be had within sixty days after the election. The contest here was commenced within that time, to wit: May, 15, 1900." (*City of Evanston v. Carroll*, 92 Ill. App. 506.) (Windes, Judge.)

On the authorities cited above, as well as the clear language of the statute, we are bound to hold that section 815 of the Code is valid and not in contravention of the statute.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

MACLAY HOYNE,
Acting Corporation Counsel.

MAY 29, 1912.

HON. WM. J. MCCOURT, Superintendent, Bureau of Water.

Dear Sir:

In response to your communication of May 17, 1912, asking for an opinion as to the right of the city to shut off the water supply to premises in the hands of a receiver on account of non-payment of bills, let me say:

That a receiver is an officer of the court, and any interference or disturbance of the possession of the property in the hands of a receiver will generally not be tolerated by the court appointing the same, as will appear from the following authorities:

“Interference by an officer in a proceeding to enforce the collection of a tax will not be tolerated.” (*In re Tyler*, 149 U. S. 164.)

Beach on Receivers (Anderson's Edition), Section 238, page 228.

“The issuing of a circular to the customers of a firm, containing statements which would lead them to infer that the business is in a failing condition or might shortly fail, is a libel on the business, and such an interference with the receiver in the discharge of his duties will constitute a contempt, which the court will punish by imprisoning the sender of the circular.” (Beach on Receivers, Sec. 251, p. 243.)

“Thus, where real estate is in the possession of a receiver, and a railway company, desiring a portion of it for the construction of its road, institutes proceedings for condemnation in accordance with statute but without obtaining leave of the court before interfering with the receiver's possession, an injunction may be granted restraining the company from proceeding until further order of the court.” (High on Receivers, Fourth Edition, Sec. 140, p. 164.)

Tink v. Rundle, 10 Beav. 318.

While interference with the possession of a receiver means in general the instituting of some kind of proceeding with the intention of ousting him of his charge and control of the trust property, and usually means a physical invasion of his rights, which will constitute a contempt in the eyes of the court, yet sometimes an interference with the operation and management of his business also constitutes a contempt of court, and the following authorities are cited:

In re Higgins, 27 Fed. Rep., p. 443.

In re Wabash Railroad Co., 24 Fed. Rep., p. 217.

Per Swinfen Eady, J., in *Dixon v. Dixon* (1904), 1 Ch. 161 at p. 663.

After the appointment of a receiver of a corporation, a creditor seeking to collect his debt should apply to the court making the appointment for leave to protect his action against the receiver, or to come in and be examined *pro inter esse eus*, the latter being regarded as the most convenient and desirable practice.

Richards v. The People, 81 Ill., p. 551.

While the shutting off of water to premises under the control of a receiver, as in the case at hand, would not be a physical invasion or disturbance of the receiver's possession, yet it would calculate to hamper and harrass the receiver in the operation and management of his business, and in order to avoid a possible question of contempt, it would be better for the Water Department to serve notice upon the receiver of its intention to apply to the court for the payment of the water bill, and that in the event of the refusal of the payment thereof, it would exercise its right to shut off water under the ordinance.

Respectfully submitted,

J. J. VITERNA,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Acting Corporation Counsel.

JUNE 1, 1912.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

Your letter of May 21, 1912, addressed to the Corporation Counsel, in which you ask for an opinion as to whether a permit may be issued to connect a sewer in North 61st Court at Irving Park Boulevard, which sewer shall run outside of the city and yet drain into the Irving Park sewer within the city, has been referred to me.

In my opinion there are three questions involved in this inquiry: First, whether the people outside of the city would be in a position to object to the assessment for a new sewer after annexation if their territory is now connected with an already existing sewer; second, whether the city would be liable for flooding of basements, etc., of buildings inside the city on property which paid for the building of the Irving Park Boulevard sewer, because of the outside sewage which would be emptied into the already existing sewer; and, third, whether the city has any authority to give territory outside the city the benefit of a sewer within the city, even although by so doing territory within the city is thereby benefited.

First. The case of the *Northwestern University v. Wilmette*, 230 Ill. 80, answers the first question to the effect that a present existing sewer is not necessarily an objection to the levying of an assessment for the construction of a new sewer. The question is not whether there is already a sewer, but whether the old sewer is adequate. If the new sewer is a benefit to property owners above and beyond the benefit rendered by the old sewer, the new sewer may be constructed. The presence of the old sewer would only be material in diminishing benefits to certain property owners who might show that in their particular case the new sewer would be of little additional benefit to them. The whole question is summed up in the *Northwestern University* case, *supra*, where the court (at page 89) said that although 'the property in said village was amply provided with facilities for the removal of the sewage of the village therefrom,' a new sewer would be a benefit because 'the streets and cellars and the basements of the houses and business blocks in said village, in times of heavy rain and freshets were flooded to a depth of several inches and in places to a depth of several feet; that during such times the water and sewage ran from, instead of into, the catch basins located upon the streets of said village, and that the present system of sewers in said village was wholly inadequate, and that it was necessary, in order to protect the property and health of the people residing in said village, that the new system provided for by the improvement ordinance in this case should be constructed.'

Second. In my opinion by issuing a permit allowing outside territory to be drained into the city sewer with the knowledge that the existing sewer in this locality is barely adequate to care for its territory, the city is thus liable for damage resulting to property owners within the city.

This question is well settled in New York by the cases of *Noonan v. Albany*, 79 N. Y. 470, and *Schriber v. Johnston*, 71 Hun 232, where the New York Court held that the discharge of a sewer into a water course which has not sufficient capacity to carry away the increased amount of water, creates a liability for damages against the city. Dillon on *Municipal Corporations*, Vol. 4, p. 3051 (5th Ed.), sums up the city's liability as follows:

“If the sewer, whatever its plan, is so constructed by the municipal authorities as to cause a positive and direct invasion of the plaintiff’s property, as by collecting and throwing upon it to its damage, water or sewage which would not otherwise have flooded or found its way there, the corporation is liable.”

This principle that a city is liable for its positive act resulting in damage by flooding, etc., is supported by the Illinois cases of *City of Jacksonville v. Doan*, 145 Ill. 23, and *Nevins v. City of Peoria*, 41 Ill. 502.

It therefore seems that in this particular case by directly granting a permit which would allow the extra amount of sewage to be drained in the Irving Park Boulevard sewer, that the city would be liable for damage resulting therefrom.

Third. What is the power of the city to construct a sewer which shall be of joint benefit to the city itself and to outside territory. In the case of *Loeffler v. City of Chicago*, 246 Ill. 43, the court decided that section 97a of the Local Improvement act which allowed two municipalities to construct a sewer jointly was unconstitutional. The court on page 52 of the above case, held “a local improvement is a public improvement which by reason of its being confined to a locality enhances the value of adjacent property as distinguished from benefits diffused by it throughout the municipality.” The court held (page 53):

“From the evidence in the record it appears this park is to be constructed within the corporate limits of two towns. The property in both the towns is assessed to defray the costs and expenses of acquiring the land and improving the park, and assessments are to be paid by the property owners of those towns, not to pay for lands lying inside and improvements which are to be made within those towns, but for lands situate outside and for improvements which are to be made outside of the corporate limits of such towns. Thus, taxes paid on property in North Chicago would be expended for lands and improvements, some of them in North Chicago and some in Lake View, and taxes paid on property situated in Lake View would be expended in North Chicago. How, then, can it be contended that the creation of a park in Lake View by taxes in part paid by North Chicago would be a local improvement of North Chicago, or, *vice versa*, in Lake View? We must hold, therefore, that an assess-

ment on property in North Chicago for a local improvement in Lake View, or *vice versa*, is not within the meaning we are disposed to give this clause of the constitution."

The above case was a bill of complaint filed by a taxpayer asking for an injunction to restrain the City of Chicago from constructing a sewer which would extend into the Town of Cicero. It was not denied that the construction of the sewer beyond the city limits into the Town of Cicero would be of benefit to the City of Chicago as well as to the Town of Cicero. The court, however, decided that the city had absolutely no power to build a sewer which should partially benefit territory beyond its jurisdiction even although it was reimbursed by the outside town for benefits conferred upon that town. The injunction was sustained.

If, therefore, the City of Chicago, in the first instance, would have had no power to construct the sewer in question so as to extend beyond the city limits and so as to serve property without the city limits; in my opinion it all the more follows that after the sewer has been constructed a permit cannot now be given giving outside territory the benefit of a city sewer. Obviously this would be doing indirectly what the city had no power to do directly. The city undoubtedly has power to construct an outlet for its sewer which shall extend beyond the city limits as long as the purpose of the construction is to increase the efficiency of the sewer for the city. As soon, however, as the construction of a sewer becomes a joint affair between the city and territory outside of it, in my opinion, the Loeffler case applies, which forbids the construction of a sewer for the benefit of two separate municipalities.

For these reasons it is my opinion that the city cannot safely grant this permit.

Respectfully submitted,

HOWARD F. BISHOP,

Assistant Attorney Board of Local Improvements.

Approved:

PHILIP J. McKENNA,

Attorney for Board of Local Improvements.

Approved:

MACLAY HOYNE,

Acting Corporation Counsel.

JUNE 4, 1912.

HON. L. E. MCGANN, Commissioner of Public Works, City of Chicago.

Dear Sir:

Your letter of May 29th addressed to Mr. William H. Sexton, Corporation Counsel, relative to the above matter, has been referred to this department. In your letter you ask:

* * * if the ordinance and issuance of a permit for the construction of the La Salle street tunnel carries with it any precedence for a permit being issued for the restoration of the pavement.

As stated in an opinion prepared in this department recently on the same subject, I can only repeat the language stated therein, namely:

That the repairing and repaving of La Salle street rests entirely in the discretion of the Commissioner of Public Works as to whether he shall elect to have said La Salle street repaved by the contractors now having the said street under reserve or whether he shall cause a permit to be issued to the M. H. McGovern Company which constructed the La Salle street tunnel, to do the work.

In the contracts between the original contractors and the City of Chicago, it is provided:

That if the said pavement should be cut or removed for the purpose of laying or repairing any gas, sewer, water or other pipe by parties having first obtained a permit from the City of Chicago therefor, the contractor or contractors agree to within five days notice so to do from the Board of Local Improvements relay, repair and repave said pavement in strict accordance with the specifications, and with such material and in such manner as will leave the whole pavement in as good and durable condition as it was before the same was cut or removed, etc.

I can not see where the McGovern Company has any rights in the matter of restoring La Salle street under the ordinance passed by the City of Chicago granting the Chicago Railways Company and the M. H. McGovern Company permission to reconstruct the La Salle street tunnel. Paragraph 58, to which Mr. McGovern makes reference in his letter herein referred to, provides that,

All paving, curbs, gutters, sewers, etc., injured or

destroyed, shall be replaced with the same character of material as at present on the site of the work, or fully repaired, to the satisfaction of the Commissioner of Public Works and the entire expense of said work shall be included in the unit price per square yard named in the proposal for paving actually placed.

This, in my judgment, in no manner affects the right of the Board of Local Improvements to compel the contractor having the street in question under reserve to rehabilitate said street, nor does it estop the Commissioner of Public Works from issuing a permit to the contractors having the street under reserve to restore said street to its original condition as provided in the several agreements between the City of Chicago and said contractors.

The Local Improvement Act governs in this and all similar cases and the Commissioner of Public Works acted clearly within his rights when he elected to have the original contractors do the work of rehabilitation instead of calling upon the McGovern Company to restore said street.

Respectfully submitted,

PHILIP J. McKENNA,

Attorney for Board of Local Improvements.

JUNE 11, 1912.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF CHICAGO.

Gentlemen:

In response to the order of your honorable body passed on May 20, 1912 (C. P. 365), in which you directed the Corporation Counsel to give you an opinion as to the right of the city to place street signs on private buildings at street intersections and as to its right to place such signs within the lot line at such places, we submit the following:

While the order seems to call for an opinion on two propositions, there is in fact only one legal question involved. That is whether the city has the right to use private property for the purpose of putting up signs and indicating the names of streets.

This is so close a question that if it was only proposed to enact an ordinance compelling property owners to permit

the use of their property in this way, we would approve its legality, but if the City Council intended to let a contract for the placing of such signs on a large scale, without testing the question in the courts, we would advise against it.

The practice of placing these signs on houses is so common in the various cities of the country that we had hoped to find some leading authority that discussed the question, but a search of the reported decisions of the reviewing courts fails to reveal any. It may be said, therefore, that this practice has been "tolerated," as one author puts it, rather than established as a matter of right.

There appears to be ground for saying that the power of the state is ample in the premises, since the use of property in this way is for a public purpose, and it may even be justified under the police power, but there has been no such delegation of this power to the municipality as would warrant us in holding that the city has this right.

There is no doubt that the state, in the exercise of its right of eminent domain, could prescribe a method by which the private property of individuals might be so used, if provision was made for compensation in case property was injured thereby. It has been held that under its power of eminent domain the state has the right, for the purpose merely of beautifying a park, to limit the height of buildings surrounding it, although there is no justification for exercising the police power for purely aesthetic reasons.

Atty. Gen'l v. Williams, 174 Mass. 476.

Aff'd in *Williams v. Parker*, 188 U. S. 491.

The marking of buildings at street corners being for the convenience of the public, comes well within the rule laid down in the above case, authorizing the exercise of the right of eminent domain.

It is also fairly well settled that the police power of the state may be invoked for the same purpose. Laws regulating partition fences, party walls, and the like, are in the nature of police regulations, and are an ancient branch of legislation and an unquestionably valid exercise of legislative power.

Myers v. Dodd, 9 Ind. 290.

Coster v. Tide Water Co., 18 N. J. Eq. 54.

McKeever v. Jenks, 59 Ia. 300.

Pursuing the same line of inquiry we find that boundary monuments may be placed on lands not only without compensation, but at the expense of the owners, upon the principle that compulsory powers may be exercised over neighboring land owners for their joint benefit.

Davis v. St. Louis Co. Commrs., 65 Minn. 310; 33 L. R. A. 432.

Townsend v. Radcliffe, 63 Ill. 9.

Hood v. Tharp, 228 Ill. 244.

There is a line of authorities which holds that a very slight interference with property rights, incident to the exercise of police powers, may be permitted without compensation. Under the rule established by these, such rights as deviation from a highway in case of need, entry upon land for the performance of a public duty, taking samples for inspection under dairy and pure food laws, and other similar slight invasions of private property rights have been upheld. The placing of signs on private property at corners may be regarded as coming within this classification. The author above referred to, in speaking of this matter, says:

“There are perhaps other cases in which a slight though permanent occupation of private property for public purposes is tolerated, as where signs with street names are affixed to private houses; but even this invasion need not, it seems, be tolerated by the owner without compensation.”

Freund on Police Power, Sec. 519.

From the above authorities we conclude that the power of the state to do what is proposed is ample, either in the exercise of its right of eminent domain or in the exercise of its police powers. Therefore, in case there could be found in the statutes a delegation of this power to the municipality, we would regard the exercise of same by the City Council as entirely lawful. But there is considerable doubt as to whether this can be done under the limited grants of power concerning same.

The original act delegating authority to the City Council contains 19 distinct grants of power relating to streets. Since

then there has been an additional grant concerning rental of overhead space.

It is evident that it was the purpose of the legislature to grant very extensive powers in regard to its streets to the municipality, but at the same time to define those powers in exact terms.

A careful examination of these twenty grants fails to disclose any which directly confers this power on the city or from which by necessary inference it can be deduced. Clause 7 authorizes the city "to lay out, to establish, open, alter, widen, extend, grade, pave or otherwise improve streets," and this would include the placing of signs in the streets, but not necessarily on private property alongside of same. The right to regulate the numbering of houses and lots is expressly given, but the only reference to naming streets is in clause 23, which gives the city power "to name and change the name of any street, avenue, alley or other public place."

It may be truly said that not every little detail concerning the use of streets and the convenience of the public in relation to same can be set forth in a statute, and there are many things which have been done in the past which were not specifically mentioned that were sanctioned by the courts. Yet under the rule that all powers exercised by a municipality must either be expressly granted or arise by necessary implication from powers so granted, the display of street signs on private property is not necessarily incident to the grant of power under clause 7, or 23, or any other of the 20 grants. If a test case were made, the courts might hold that either clause 7 or clause 23, coupled with the general police powers of the city, would be sufficient to justify an ordinance of this kind, but it is far from certain.

While, therefore, there is much reason for believing that an ordinance requiring owners of property to permit the placing of such signs would be sustained and held valid, nevertheless there is so much doubt about it that we do not feel justified in assuming the responsibility of giving sanction to

a proposition which may involve the making of a contract of considerable magnitude, without a test case being first decided.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JUNE 15, 1912.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

The inquiry of John D. Riley, Esq., Superintendent of Maps, of the 10th inst., with reference to the validity of two ordinances vacating certain streets, by the Board of Trustees of the former Village of Hyde Park subsequent to the election at which said village was annexed to the City of Chicago, but before the result of said election had been ascertained and officially declared, is herewith answered in favor of the validity of said ordinances.

Section 1 of the Act to provide for the annexation of cities, incorporated towns and villages, approved and in force April 25, 1889, provided that the ballots cast at an election held under the provisions of said Act, shall be canvassed and returned the same as ballots for municipal officers and a certificate of the result of such canvass filed with the Clerk of the County Court, and if it shall appear that a majority of the voters, etc., have voted for annexation, *thereupon the jurisdiction of the incorporated city, etc., shall extend over the annexed territory.*

In the case presented it appears that the official declaration of the result of the canvass was filed in the County Court two weeks after the passage of the ordinances. They constitute, therefore, a valid exercise of the charter powers by the trustees of said village.

Very truly yours,

NICHOLAS MICHELS,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JUNE 17, 1912.

HON. LAWRENCE E. MCGANN, Commissioner of Public Works.

Dear Sir:

In reply to your letter of June 6, 1912, relative to the request of George H. Meyer requesting a bill for water service pipes for certain lots on Hirsch Street where water service pipes were put in in error, etc., and the communication of George H. Meyer, and plat of the Water Pipe Extension Bureau thereto attached, let me say that this office has ascertained (1) that these service pipes were laid in pursuance of a special assessment recommended by the Board of Local Improvements which said assessment thereafter was declared void and set aside, (2) that Daniel Hardin installed these water pipes before the setting aside of said special assessment and received payment in full for said work by Council Order (C. P. March 30, 1908, page 4730).

This last mentioned order of March 30, 1908, took precedence over the Council Order of November 25, 1907 (C. P. same date, page 3324), and we understand that payment was made to Hardin under the Council Order of March 30, 1908; and there is this inaccuracy in both orders, to wit: that both orders state by mistake "Buttons Subdivision" instead of Brittons Subdivision as it should accurately be, further, the order of November 25, 1907, includes lots one (1) to twenty-four (24) inclusive, while the order of March 30, 1908, includes lots one (1) to four (4) both inclusive and lots seven (7) to twenty-four (24) both inclusive in block eight (8) which appears to be correct.

On the 15th day of April, A. D. 1908, there was recorded in Book 10345 of Cook County records, page 22, under documentary number 4,187,414, in order to establish a lien against the lots into which the service pipes were installed, the following notice, by the City of Chicago:

"To Whom It May Concern: Notice is hereby given that the City of Chicago is the owner of all of the water service pipes in Hirsch street, between 42d avenue and 43d avenue, in the City of Chicago, State of Illinois, County of Cook, said water service pipes being in front of Lots one (1) to four (4), both inclusive, and Lots seven (7) to twenty-four (24), both inclusive, in Block eight

(8), Button's Subdivision (which in reality should be Britton's Subdivision) of the Southwest one-quarter (S. W. $\frac{1}{4}$) of the Northwest one-quarter (N. W. $\frac{1}{4}$) of Section three (3), Township thirty-nine (39) North, Range thirteen (13), East of the Third Principal Meridian.

And notice is further given that no connection of said water service pipes with the city water mains, in said Hirsch street, between 42d avenue and 43d avenue will be permitted by the said City of Chicago until the person or persons desiring said connection or the use of the water that flows through said water mains shall first pay his or their proportionate share of the cost of said water service pipes with interest on the same to date of payment as per records platted in the plat books in the Water Pipe Extension Bureau of the City of Chicago. This being in accordance with the Order of the City Council of the City of Chicago passed March 30, A. D. 1908 (see page 4730, C. P. of said date)."

(Signed) JOHN J. HANBERG,
Commissioner of Public Works,
City of Chicago.

Section 2735 of The Chicago Code of 1911 says:

"No water shall be supplied to any building, structure or premises in the city, where water is not now being supplied from the Chicago water works system, nor shall any person be permitted to tap any water main or make any connection with any service pipe or supply pipe for the purpose of furnishing water to any building, structure or premises or for any other purpose, until an application in writing shall first have been made to the Commissioner of Public Works by the person desiring such building, structure or premises to be supplied with water or desiring to tap any such main or to make connection with any such service or supply pipe. Such application shall set out the full name and address of the applicant and shall state fully all purposes for which a water supply is desired or for which it is desired to tap such water main or make connection with such service or supply pipe, and such applicant shall be required to answer truthfully all questions which shall be put to him by the Commissioner of Public Works or any officer or employe of the Bureau of Water relating to such application or to the use to be made of the water to be supplied to such applicant. Thereupon such applicant shall be permitted to have water supplied to his building, structure or premises from the Chicago water works system and to tap any such water main or make con-

nection with any such service pipe or supply pipe, as requested in his application and in accordance with the direction of the Commissioner of Public Works and under his supervision and to his satisfaction and approval; provided, that the tapping of any water main shall be done only by a tapper who is an employe of the Department of Public Works."

While the recording of the aforesaid notice may not in law be sufficient to establish and create a lien, because of a want of privity and contract between the city and the property owners, and while probably no legal action could be based upon said notice for the purpose of enforcing a lien or for the recovery of the money involved, yet the filing of this notice was a sufficient declaration to the property owners concerned that the city did not waive any of its rights in the premises and that it intended to make charge for any service pipe which might be made use of by any of the property owners concerned, as required by Section 2735 of the Chicago Code of 1911 above quoted and Section 2745 as amended of the Chicago Code of 1911, which specifies that the property owner shall pay for the installation of water service pipes. It therefore follows that the property owner (apparently represented by Mr. George H. Meyer, an attorney) should apply at the office of the Commissioner of Public Works and furnish all the necessary information, as to who is the owner, for what purposes the water is to be used, whether one or more service pipe is intended for use, etc., before he shall be entitled to have water flow into the premises involved, and thereupon the city shall make its proper charges (under Section 2745 as amended of the Chicago Code of 1911) for the service pipe or pipes already installed, and to be connected and tapped with the water main, basing their charge upon what it would cost to install a similar service pipe today, and making an additional, reasonable charge for the value of the work and labor to be done. But, in the judgment of this office if there are already two service pipes leading into the premises concerning which George H. Meyer makes inquiry, the city would be justified in charging for only one of them, inasmuch as the special assessment under which the two service pipes were originally

put in was declared void, and for the further reason that the city should not compel the owner to use two service pipes where only one is necessary. As to whether two service pipes are already in front of the premises herein involved, and whether only one will be necessary, when the proper application for the turning on of the water is made, is a matter to be determined by the Commissioner of Public Works at the time such application is made. As regards this particular phase of the matter, we advise the Commissioner of Public Works to direct a communication to Meyers requesting the presence of the property owner to make application for water and first secure a permit therefor as Section 2735 requires, and also inform the property owner of his duty to pay for the installation of said water service pipe as required by Section 2745 as amended of the Chicago Code of 1911; in view of the foregoing, we see no reason why a bill for the water service pipes should be sent to said Meyers.

The fact that the special assessment under which the service pipes in this particular locality were laid was declared void, does not deprive the city of the right to charge for the same when the owners of the lots in front of which these pipes were laid desired to use them and make connection with the water main, (1) because these pipes are the property of the city, (2) the city has a right to charge for the same, (3) the party desiring to use the same must make proper application, as required respectively by Section 2735 and Section 2745 as amended of the Chicago Code of 1911.

As regards the other portion of your letter wherein you state that in a few cases connections have already been made with the service pipes without securing a permit, this department is of the opinion that said persons can be compelled to pay for any service pipes that they may now be using and also for tapping that was done, based upon what it would cost to install a similar water service pipe today together with reasonable charges for the labor and tapping, and bills should be rendered therefor to said parties, (1) because they are securing water without a permit and (2) they are using a water service pipe for which the city has a right to charge under Section 2745 as amended (3) this service

pipe is now the property of the City of Chicago; (4) under Section 2742 of the Chicago Code of 1911, the parties tampering with said water mains and pipes can be penalized and fined. However, it is doubtful whether the city can now shut off the water supply to these premises under these last mentioned circumstances if the consumers of the water have been paying and are now paying for the same, as neither Section 2734, Section 2736, Section 2743, nor Section 2793 of the Chicago Code apply.

There does not seem to be an ordinance giving the city a right to shut off the water to premises where the owner failed to secure a permit under Section 2735 and where he failed to pay for the water service pipe and cost of installing the same, (1) as this kind of a situation was not and probably could not have been foreseen by the makers of the ordinances, (2) and as it is usually customary on the part of the city to collect payment for installation of the same and services therewith connected at the time application for a permit to make connection is made.

Attached hereto please find return of all correspondence involved.

Respectfully submitted,
J. J. VITERNA,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JUNE 17, 1912.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

In your communication dated June 4, 1912, with reference to building for factory purposes on Kimball avenue near Belden avenue, you state that the district in question is residential, and you ask to be advised whether the city has the power to refuse a permit for the erection of such a building as is proposed. You failed to state what kind of a factory was contemplated, but we have ascertained that in your letter relating to the same subject-matter, addressed to the Commissioner of Buildings, you made mention of the fact

that the persons protesting against the issuance of a permit claim that same is to be a box factory. We assume this to be correct and submit this opinion accordingly.

There is no ordinance now in force limiting the location of such a factory, and no power is vested in the city to control same. At the time the present building ordinance was passed (December 5, 1910) it was provided by Section 712 that frontage consents would be required in residential districts in the case of

“any building or place used for gas reservoir, packing house, rendering plant, soap factory, tannery, blacksmith shop, foundry, or machine shop or factory combined with a foundry, or laundry to be run by machinery, or livery stable.”

You will observe that the ordinance did not include all machine shops or all factories, but only such machine shops and factories as were combined with a foundry. This was in accord with the statute as it existed at that time, no power being granted therein to control the location either of a machine shop or a factory, and consequently only such as were combined with a foundry could be regulated in this way. Through mistake, when the Chicago Code of 1911 was enacted the word “or” appearing before machine shop was omitted and a comma was placed after “machine shop.” This would have given rise to some doubt in case the city had authority to control the location of machine shops, but by applying a familiar canon of construction, we interpreted the ordinance to mean that the location of machine shops as well as factories was limited only in case such machine shop was combined with a foundry.

The legislature, by an act which went into effect July 1, 1911, extended the powers of the municipality so as to include the regulation of the location of machine shops. Under this additional power, the city council, on March 11, 1912 (C. P., 3171), passed an ordinance amending Section 712, so that it limited the location of

“any building or place used for a gas reservoir, packing house, rendering plant, soap factory, tannery, blacksmith shop, foundry, machine shop, factory or machine shop combined with a foundry, laundry to be run by machinery, or livery stable.”

It will be observed that there is a limitation on machine shops and also on machine shops combined with a foundry. It was hardly necessary to specify the latter, since the term "machine shop" included a machine shop combined with a foundry but the mere fact that there is a repetition of that kind does not affect either the validity or the meaning of the ordinance as amended. This ordinance as it now stands prohibits the construction of a machine shop in residential districts. It also prohibits the construction of a factory combined with a foundry in such districts, but does not prohibit the construction of any factory that is not specifically mentioned if it is not combined with a foundry.

We had occasion some time ago to advise the Commissioner of Buildings that the location of planing mills could not be controlled by the municipality, and in our opinion stated that, aside from a few exceptions, no power is given by the statutes to control the location of factories, and that the provision in the ordinance above referred to restricting the location of a factory combined with a foundry is authorized only under the power to control the location of foundries.

Aside from the factories specifically mentioned in the section containing the various grants of power in the Cities and Villages Act, there is a general provision in the 63d clause authorizing the city

"to prevent the carrying on of manufactories dangerous in causing and promoting fires."

Under this clause such factories as powder mills, match factories, celluloid factories, etc., might be excluded if a proper ordinance were framed, but we do not interpret this clause as broad enough to authorize the city in excluding factories generally from residential districts, even though they may be filled with inflammable materials, as a box factory or planing mill would naturally be.

It will, therefore, be seen that in case application is made for a permit for the erection of a factory building, in the district referred to, which has no foundry connected therewith and does not come within those specifically mentioned in the

ordinance as requiring frontage consents, a permit will have to be granted. This includes a permit for a box factory.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JUNE 17, 1912.

HON. HARMON M. CAMPBELL, President, Civil Service Commission.

Dear Sir:

I have before me a communication from Commissioner John J. Flynn setting forth the following condition of affairs in the classified service of the city.

Upon the adoption of the civil service law by the voters of the City of Chicago in 1895 and the establishment of the first civil service commission, all positions, offices and places of employment, other than those comprehended in Section 11 of the civil service act, were classified in grades or ranks based upon salary or compensation. This system of classification was maintained until a few years ago.

During the time in which the classification was based upon compensation, the salaries of many civil service employes were raised from year to year by the city council in the annual appropriation ordinance. This increase in pay was not accompanied by a promotional examination on the part of the employe and, under the classification of grades as it then existed, removed the employe in many cases not only out of his then grade, but in some instances employes have been removed by increased compensation three or four grades above the grade under which they entered the civil service. The method of establishing grades has now been altogether changed and grades have been fixed in accordance and with respect to the duties of the positions falling within the grade.

The question presented by your communication relates to the means to be adopted to place those employes who have

been legislated out of their proper grade by salary increases into proper grades with the view to hereafter allowing no salary increases except after promotional examinations. In brief, the commission desires to bring about an end to the present disorganized grade system and put into effect an arrangement whereby all the employes in the city's service will be properly graded and will be performing the duties prescribed in their respective grades and receiving the compensation applicable to such grades. To effectuate this, the commission now proposes to pass resolutions, copies of which are contained in the communication before me and whose effect is to make employes who are now performing the duties and drawing compensation above the grade to which they may have been certified, where such duties have been performed and compensation received for a period of not less than six months, eligible to promotion to the next grade above that which they are actually filling, irrespective of the grade to which they were certified. The orders contemplated also provide that holdovers shall be treated in the same manner as the employes mentioned in the foregoing order. In other words, that a holdover who has been advanced in salary from time to time may now take a promotional examination for the grade above the one, the duties of which he is now performing.

From your communication it appears fairly evident that the methods suggested by you will rectify the evil which has arisen in the civil service grading system and continued for many years. It would be obviously unfair and contrary to all proper idea of civil service promotion that employes who have faithfully performed their duties to the satisfaction of the heads of the various departments should, by reason of the raise in salary by the council, be legislated out of their position. Your communication states that in most cases the increases in compensation were merited.

The method proposed in my opinion offers a reasonable solution of this much vexed question. I am not prepared to say that it resolves the difficulties presented in the best or only possible manner, but after months of consultation with the various heads of departments, the finance committee and

your commission, no one has been able to suggest a plan which more effectually remedies the evils of the situation.

In view of the fact that the resolutions proposed are designed and promulgated for the purpose of effectuating a more complete institution of the workings of civil service with respect to city employment and to bring within the scope of civil service a greater number of employes, to properly and reasonably classify the persons who, through no fault of their own, have been forced out of grade, I think that the courts of the state would uphold the proposed action as conducive to a better and broader enforcement of the civil service law.

Yours respectfully,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JUNE 17, 1912.

HON. HENRY ERICSSON, Commissioner of Buildings.

Dear Sir:

Your inquiry concerning the location of a garage on Chestnut place between Delaware place and Chestnut street was referred to the writer for an opinion. You sent certain plans, a survey plat and letters along with your communication concerning the above. We have received other communications relating to the same subject-matter and have had some interviews with the parties interested. It seems that the location is in a residential district and in close proximity to a church now in course of construction.

From the data above mentioned, we gather that there is now a small building, which is said to be a private garage, located on the premises in question, and it is proposed to enlarge same so that, upon the completion of the alterations, the dimensions of the building will be at least fifty by ninety feet.

The building is owned by Mr. Henry Busching. Some time ago Mr. Busching undertook to secure frontage consents for the purpose of constructing an enlarged building to be

used as a public garage, but was unable to get the necessary frontage consents. It is now claimed by Mr. J. G. Coleman, whose place of business is located at 220 S. Michigan avenue, that Busching is his private chauffeur. He states in his letter to the building commissioner that Busching is employed by him for the purpose of taking care of the cars owned by him and his sons (at present five cars, but which they intend to increase to seven).

Mr. Coleman in two letters addressed to the commissioner of buildings and the building department, is particular to state that Busching is his private chauffeur; that the place in question is now owned by Busching but is not large enough to accommodate the private cars which are being stored there for him, nor to admit the additional cars which he intends to store there; also that he is paying for the erection of the proposed building, which is to be used as a private garage. It does not appear from Mr. Coleman's letter whether his sons who own some of the cars are members of his immediate family, or have establishments of their own, nor have we learned where Mr. Coleman and his sons live, but we have ascertained that none of them live in close proximity to the site of the proposed building.

There are many conflicting statements before us concerning the use to which the enlarged building is to be put, and the impression seems to have gone abroad that the right to locate such a garage on the premises in question depends on whether the place is to be used in the manner described by Mr. Coleman or whether it is to be used as a public garage for other parties as well as the Colemans. We do not consider this as the controlling feature in the case. According to our view, it is not proper for a person to erect even a private garage, for storing two or more cars, away from his own residence so that he does not experience the objectionable features of same, but in the midst of some other residential district where people residing around it are inconvenienced.

A garage is defined with great exactness in Section 2683 of the Chicago Code of 1911. That section does not distinguish between a public and a private garage. It is true that in determining whether or not a building was a garage within

the meaning of this section, this department has, on several occasions, drawn a distinction between a public and private garage. This was made necessary by the peculiar circumstances in each case, the question involved being of such a nature that it called for a determination of this question. But, under ordinary circumstances, the question of whether or not a garage is a public or a private one is not important.

Under Section 2683 a building where automobiles are "kept" is included within the meaning of the term "garage." In the case under consideration, even if all the automobiles were the private property of one person, they are still being kept for this person, and it would make no difference even if the person who keeps them is exclusively in the employ of the owner. There is a distinction between keeping automobiles at a place away from one's own private grounds, and maintaining a building for such purpose in close proximity to one's home on the ground used and occupied as such.

The word "kept" in its legal acceptance applies in the one case while it does not in the other. "Kept," as used in the ordinance, implies a permanency of storage and maintenance that is not usually associated with the housing of one or more automobiles in a building at one's private residence.

Springfield F. & M. Ins. Co. v. Wade, 58 L. R. A. 714.

Long v. City of Portland, 151 Ind. 442.

Com. v. Patterson, 138 Mass. 498.

We have, therefore, reached the conclusion that you were right in refusing to issue a permit for the proposed building and such refusal ought to be persisted in.

We return herewith the two letters of Mr. Coleman, above referred to, also the blue prints you submitted to us.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JUNE 17, 1912.

CHAS. F. SEYFERLICH, Esq., Fire Marshal.

Dear Sir:

I have considered your communication of the 11th instant, with reference to the jurisdiction of your department in the matter of the proposed construction of a boat with tank for the purpose of carrying and vending gasoline to power boats along the city's water front, as set out in the accompanying communication to your department from C. E. Jackson and am of opinion that there is in force at the present time no ordinance covering this subject, excepting possibly Sections 1679 to 1682 of the Chicago Code of 1911, which regulate the manner in which retail venders or dealers in gasoline, etc., may pursue their business without subjecting themselves to the penalties therein provided.

Sections 691 to 694½ deal with the storage of oils in buildings and can hardly be applied to the case under consideration, for the reason that the Commissioner of Buildings is without jurisdiction over the construction of boats.

Nor is there in the ordinances any provision for a license fee in a case like the one presented.

Only boats, launches or vessels let for hire (Section 180) or used for the collection of junk (Section 2251) or for the peddling of oil from wagons (Section 1771), are required to pay a license fee.

However, in a general sense it is my opinion that you are empowered by Section 694½ to inspect any boat constructed for and intended to be used by a vendor of gasoline in the harbor of the city, and thus indirectly to enforce the pertinent provisions of the code relating to the storage and vending of oils, etc., in the interest of the public safety.

In conclusion, power is vested in the city council to pass an ordinance regulating the matter of storing and retailing oils from boats, like the one proposed to be constructed by the writer of the communication which is herewith returned.

Very truly yours,
NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JUNE 17, 1912.

DR. G. B. YOUNG, Commissioner of Health.

Dear Sir:

Your letter with reference to the location of the Lakeside Hospital on Prairie avenue between 49th and 50th streets, was referred to the writer for an opinion.

You state in same that the proposed site is in the same block and within four hundred feet of the Illinois Industrial School for Colored Girls, also that within the same block is located a training school for home, foreign and city missions.

You further state that the Industrial School is conducted under the auspices of the Sisters of the Good Shepard, and that colored girls are committed to this institution by the court and their tuition and keep are paid for by the state.

You request an opinion as to whether either of the above schools were to be construed as public or parochial schools under Section 1220 of the Municipal Code.

A public school is generally regarded as a school that derives its support entirely or in part from moneys raised by a general state, county or district tax. (*Cook v. School District No. 12*, 12 Colo. 453.)

“As used in the American reports, the term generally refers to the common or public school existing under the laws of each state and maintained at the expense of the public.”

(Bouvier's Law Dictionary.)

In some cases the term “public school” was held to be synonymous with “common school.” (*Jenkins v. Inh. of Andover*, 103 Mass. 97.) While this is rather a narrow interpretation and we ordinarily regard high schools, normal schools and universities, which are maintained by the state, as public schools, yet the meaning of the term is never extended so far as to include penal institutions or institutions run by private parties, even if they draw some of their revenue from public sources.

Therefore a quasi-penal institution like the Illinois Industrial School for Colored Girls cannot be regarded as a public school.

As for the training school for missions, we assume of course that this is not supported by public funds.

Hence the only question with regard to this is whether it could be classed as a parochial school.

The term parochial is derived from the word "parish." The word parish is used to designate ecclesiastical divisions, and when used in this sense is intended to indicate the territory committed to the particular charge of a parson or priest. (*Truigg v. Treacy*, 104 Pa. 493.)

"A parish is understood to be the territorial jurisdiction of a secular priest, or a precinct, the inhabitants of which belong to the same church, or they may reside promiscuously, among people belonging to any church, and be resident in several villages." (*Hebert v. Laville*, 27 Ill. 454.)

It will be seen from the above that a parochial school must be construed as one coming under the territorial limits of a parish of some religious sect which exercises ecclesiastical jurisdiction over the people of that faith therein and provides schools within the same.

It does not appear from the names or the descriptions we have of either of the above mentioned schools that they are parochial schools.

Therefore the hospital you speak of may be located within four hundred feet of them provided the necessary frontage consents are obtained.

Yours respectfully,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JUNE 17, 1912.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

I have your communication requesting an opinion upon what you conceive to be a conflict between the annual appropriation bill for 1912 and Section 2719 of the Chicago Code of 1911. Your specific inquiry is whether you are to be governed by Section 2719 and disburse wheel tax receipts collected in each ward for the repairs of streets in such ward,

or does the appropriation bill for 1912 repeal *pro tanto* such parts of Section 2719 as provide for disbursements of wheel tax funds according to wards.

Section 2719 of the Chicago Code of 1911 provides in part as follows:

“All revenues derived from such license fee shall be kept as a separate fund and used for paying the cost and expenses of street or alley improvement or repair.

The city collector shall keep a separate account by wards showing the amount of revenue obtained from each ward in which any vehicle not drawn by animal power is kept when not in use, and in which any animal or animals are kept drawing any wagon or vehicle for which a license is procured under the provisions of this article.

Fifteen per cent. of the total revenues thus obtained shall be set aside, to be expended in the discretion of the commissioner of public works and under his direction, for the repair of such streets upon which there is an unusually heavy amount of traffic.

So much of the remaining eighty-five per cent. of the revenues obtained from each ward, as, in the discretion of the commissioner of public works, may be needed for immediate use, shall be expended under the direction of said commissioner for the repair of streets and alleys in such ward, and the balance thereof shall remain to the credit of such ward account to be used as occasion requires.”

The appropriation bill for 1912, under the heading “Street or alley improvement or repair, including oiling of macadam streets,” contains various items amounting to \$576,557.69, “to be paid from receipts of vehicle licenses.” The estimated amount of wheel tax receipts for 1912 is about the total sum named in this appropriation.

In my opinion, after conference with the chairman of the finance committee, it was not the intention of either the finance committee or the city council in making this appropriation to repeal, abrogate or modify any part of Section 2719 of the Code. Two principles of statutory construction must be kept in mind; one is that repeals by implication are not favored in law, and another that where two statutes or ordinances are to be construed together, they must be con-

strued so as to give harmonious effect to both, if such can be done.

If the appropriation as made can be utilized by an expenditure under your direction for repairs of streets and alleys in wards according and with reference to revenues obtained from each ward and at the same time come within the limits of the items of appropriation as specified in the appropriation for street and alley improvement or repair, such a course should be followed. In case a compliance with the terms of Section 2719 of the Code compels a departure from the enumerated items of the appropriation bill, doubtless a transfer from one item or account to another can be made in pursuance with the practices which obtain in the finance committee.

In other words, so far as possible the directed expenditure of money according to the items of the appropriation bill must be read in conjunction with and agreeably to the provision of the ordinance which requires a distribution of the vehicle tax fund and its expenditure according to wards.

Yours very respectfully,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JUNE 19, 1912.

HON. G. B. YOUNG, M. D., Commissioner of Health.

Dear Sir:

We have your communication of the 5th instant, requesting an opinion on the relative obligations of the county and city governments to care for certain classes of persons, particularly and fully described in the questions propounded.

Many of the propositions submitted to this department for consideration are so related and dependent one upon the other that we deem it advisable, before attempting to answer them categorically, to state generally and as briefly as possible, the law relating to the subject-matter.

THE POWERS AND DUTIES OF THE COUNTY.

Chapter 107, Hurd's Revised Statutes, 1909, entitled, "Paupers," makes extensive provisions for the temporary and permanent relief, care, custody and support of the poor by the county in which they reside, the removal of such as are not residents of the county, and provides that,

"When any non-resident, or any person not coming within the definition of a pauper, shall fall sick or die not having money or property to pay his board, nursing and medical aid or burial expenses, the overseers of the poor of the town or precinct in which he may be, shall give or cause to be given to him such assistance as they may deem necessary and proper, or cause him to be conveyed to his home and if he shall die cause him to be decently buried; and the county shall pay the reasonable expenses thereof."

To properly perform the duties imposed upon the county, the board of commissioners is given power to acquire property, to erect and maintain a county poor house, and other necessary buildings, to establish and maintain a farm for the employment of the poor, to receive gifts, devises and bequests, to employ a keeper of the poor house, a county physician, and such other agents and servants as the board may deem necessary, to make all needful rules and regulations for the management of the property devoted to the uses aforesaid and of the inmates of the poor house and also to make all proper and necessary appropriations out of the county treasury and levy taxes for the establishment and maintenance of such property and for the support and care of such poor.

Under an act entitled, "An Act to amend Section 24 of an Act entitled 'An Act to revise the law in relation to counties' approved and in force March 31, 1874, as amended, etc.," approved June 6, 1911, in force July 1, 1911, it is provided (Laws, 1911, p. 246):

"§24. Each county shall have power— * * *

FIFTH. To purchase and hold real estate upon which may be erected and maintained by the county a sanitarium for the care and treatment of the residents of the county who may be afflicted with tuberculosis, and to purchase, hold and use all necessary personal property

for the proper care and maintenance of such real estate and sanitarium.

SIXTH. To cause to be erected, or otherwise provided, suitable buildings for, and maintain a county hospital and necessary branch hospitals for the care of such sick as may by law be proper charges upon the county, and to provide for the management of the same."

Thus, except in cases of persons afflicted with tuberculosis, for the care of *all* which, poor or rich, the county is given *power* to erect and maintain a sanitarium, the *powers* and *duties* of the county are co-extensive with and limited to care for, or remove to their homes in some cases, all sick persons within the county who have not money or property to pay for board, nursing and medical aid, and to cause to be decently buried all such persons who die. This applies to all such persons afflicted with any kind of ailment, infectious, contagious or otherwise, whether the treatment necessary be medical or surgical.

See *County of Perry v. City of Du Quoin*, 99 Ill. 479.

THE POWERS AND DUTIES OF THE CITY.

The city has no power to care for dependent persons except as such care may be incident to the promotion of health or the suppression of disease.

The power of the city to care for the sick is much broader than that of the county, but the duty enjoined upon the city is in a certain sense more limited in its scope.

Section 1 of Article V of the Cities and Villages Act gives the city council the following powers:

"Seventy-sixth. To appoint a board of health, and prescribe its powers and duties."

"Seventy-seventh. To erect and establish hospitals and medical dispensaries, and control and regulate the same."

"Seventy-eighth. To do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease."

Under the foregoing powers, the city *may* conduct hospitals either as a charity or as a means for the promotion of

the general health of all its residents or the suppression of disease among all the inhabitants of the municipality.

See *Tollefson v. City*, 228 Ill. 124.

It is, however, the *duty* of the city to make such provisions as are reasonably necessary to prevent the spread of disease and protect those who are not infected.

County of Perry v. City of Du Quoin, supra.

While the city may, in the exercise of its police power, and under the express statutory provisions hereinbefore quoted erect and maintain hospitals and confine and care for therein persons afflicted with infectious or contagious diseases, it may nevertheless recover from the county government for the necessary expenses to which the city is put in caring for such persons as are made a proper charge upon the county by the "Pauper Law" heretofore referred to.

Ibid.

The foregoing is not, however, applicable to cases in which poor persons are afflicted with tuberculosis, because under an act entitled,

"An Act to enable cities and villages to establish and maintain public tuberculosis sanitariums," approved March 7, 1908, in force July 1, 1908 (see Hurd's Revised Statutes, 1909, p. 501),

the city is given the power to erect, establish and maintain such hospitals and it is provided that every sanitarium established under said act shall be free for the benefit of the inhabitants of the city who may be afflicted with tuberculosis and they shall be entitled to occupancy, nursing, care, medicines and attendance according to the rules and regulations prescribed by the board of directors of the sanitarium. (See Sec. 7.)

THE QUESTIONS SUBMITTED AND THEIR ANSWERS.

1. "What obligation is placed upon the county government to provide hospitals for the sick?"

The county has the power to establish and maintain hospitals for the sick poor. It is the duty of the county to provide medical attention and to care for and support the sick poor.

2. "What obligations are placed upon the city government to provide hospitals for the sick?"

The city has the power to establish and maintain hospitals for the sick. There is no obligation on the city in that regard.

3. "Is the obligation of either the city or county mandatory or optional?"

It is mandatory upon the county to provide medical attention and to care for and support the sick poor, but not to establish and maintain hospitals for them.

It is optional with the city to establish and maintain hospitals for the sick.

4. "Which government is charged by law with the hospital care of contagious diseases, namely, scarlet fever, diphtheria, smallpox and measles?"

The county government is obliged to provide medical attention and care for and support all poor persons afflicted with contagious diseases, but it is not obliged to provide hospital care for them. It has the power, however, to do so.

The city has the power to provide hospital care for such cases, but it is not its enjoined duty so to do. It is, however, obligated to make necessary provision to prevent the spread of contagious diseases, and if in the performance of such duty the city provides hospital care for such cases, it may recover from the county for the necessary expenses of the care of such cases as the county is bound to provide for, that is, poor persons.

5. "Which government is charged by law with the care of cases of tuberculosis?"

Both the county and city have the power to care for tuberculosis cases.

The county is bound to care for such cases among the poor.

If the city has established and maintains a sanitarium for such cases it is bound to care for all who apply, provided, of course, there are facilities for such care at the time of application.

6. "Which government is charged by law to provide ambulance service for patients to be taken to (a)

hospitals maintained by the county; (b) hospitals maintained by the city?"

Neither government is bound to provide ambulance service, but if such service is provided by either, it is not charged by law to serve patients to be taken to hospitals maintained by the other.

7. "Which government is charged by law with the providing of temporary care for able bodied but dependent persons, such as are commonly taken care of in a lodging house?"

The county.

8. "Which government is charged by law with the care of cases of delirium tremens that develop in hospitals or that should go to hospitals, and that are not charged or held for any crime?"

The county is bound to care for such cases among the poor.

The city has the power but is not obligated to care for any such case.

9. "Which government is charged with the care of cases of delirium tremens that are 'police cases?'"

The city.

10. "Which government is charged with the maintenance of emergency hospitals and first-aid stations, and the giving of first aid to the injured?"

The city has power to maintain such hospitals, but it is not obligated to do so.

It is the duty of the county to give such medical aid and care as is necessary in emergency cases where the patient has no money or property with which to pay for such care. If the city gives aid to such persons it may recover from the county the cost thereof.

11. "Which government is charged with the duty of providing and delivering provisions to dependent cases of contagious disease that are quarantined in their homes by the Department of Health?"

The county.

12. "Which government is charged with the duty of burying dependent or pauper cases of contagious disease, dying either in homes or in the contagious disease hospitals?"

Both the city and the county are charged with that duty. The city because it is necessary for the protection of the health of its inhabitants and the county because it is charged with that duty under the Pauper Law. The city may, however, recover from the county, when the latter neglects to bury such dead, for the cost of burial by the city.

Respectfully submitted,
JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JUNE 19, 1912.

MR. WILLIAM D. CASSIDY, Clerk, Municipal Pension Fund.

Dear Sir:

We appreciate the necessity and advisability of making reasonable rules and regulations in regard to the deductions from the salaries of such employes whose period of probation expires during the fiscal month of the city as well as in cases of separation from service or of death of an employe during such fiscal month, not inconsistent with the terms of the pension act. It is provided in said act as follows:

“Said fund shall consist of amounts of \$2.00 a month retained or deducted by the comptroller of such city, village or town, from the salary or wages of each employe, and such other sums as are hereafter referred to.”

The foregoing provision does not specify whether such sum shall be deducted each month in advance or at the end of a month's service, and it is our opinion that it is permissible for the comptroller to deduct the full amount of \$2.00, out of the first payment made to any employe whose probation period has expired.

In the case of an employe whose name is stricken from the pay roll by reason of leave of absence, sickness, lack of work, or any other good and sufficient cause, except permanent separation from service or death, it is permissible for the comptroller to deduct the full amount of \$2.00 from such employe's pay even though he does not receive a full month's salary by reason of such absence, because it is provided in

said act that such employe may retain all his rights to the benefits thereof by the payment of \$2.00 each month during temporary absence.

In case of permanent separation from the city's service or in case of death, it is our opinion that the amount to be deducted should be pro rated according to the number of days served during the last fiscal month. This is in view of the fact that after such separation from service or upon death, such employe ceases to derive any benefits from said pension fund, and the obligation to pay should also thereupon be terminated.

Respectfully submitted,
J. F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JUNE 20, 1912.

MR. WILLIAM D. CASSIDY, Clerk, Municipal Pension Fund.

Dear Sir:

Referring to your request contained in your communication of April 25, 1912, asking this department to reconsider our opinion of January 22, 1912, in view of the fact that upon further investigation at the office of the Civil Service Commissioners in regard to their status, we find that they are designated as "temporary night watchmen" for the reason that they are temporarily assigned to duty to particular buildings or jobs, but that in fact these employes have been regularly appointed and certified as permanent employes under and by virtue of the Civil Service Law, or were appointed as such prior to the passage of the Civil Service Act, we must hold that they are not "temporary or probationary employes" within the meaning of the act. They are, therefore,

entitled to the benefits thereof and the sum of \$2.00 should be deducted each month from their salaries or wages.

Respectfully submitted,
JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JUNE 20, 1912.

HON. HENRY ERICSSON, Commissioner of Buildings.

Dear Sir:

You have addressed a letter to this department in which you ask what your rights and duties are in cases where you are seeking to compel non-resident owners of buildings to comply with the provisions of the ordinances. You state that your inquiry is directed mainly to Sections 201 to 204 of the Chicago Code of 1911, and ask whether you have the right, under Section 201, to order the occupants of buildings where such non-resident owners are violating the building code, to vacate same, and to place police officers there to refuse admission.

You also set forth some specific instances where you have been unable to compel such non-resident owners to make alterations in order that their buildings may conform with the Code, and you ask particularly with reference to these cases what you shall do.

In this reply we will undertake to define your powers in general first, and then advise you as to the best course to pursue in each of the particular cases.

There need be little doubt about the interpretation of Sections 202, 203 and 204.

Section 202 deals with buildings in a dangerous condition. In paragraph (e) of this section express provision is made for vacating such buildings and no one may enter same except to make repairs. Your mode of procedure is explicitly set forth, and special provision is made for pursuing same in the case of non-resident or inaccessible owners.

Section 203 relates to what can be done in case the build-

ing laws are violated during the construction of a building without much reference as to whether the owner can be found or not, since there is always some one in control of building operations on whom notices can be served, and whatever action you are required to take can be taken regardless of whether the owner is a resident or not.

Section 204 simply gives authority to call on the fire department to assist in the work of tearing down improper work or old or damaged buildings in extreme cases after due notice.

We apprehend, therefore, that the question is narrowed down to what the proper interpretation of Section 201 is in the light of the provisions of the other sections mentioned; and more specifically whether you have the right under paragraph (c) of this section to require the occupants to vacate same after due notice has been served concerning repairs required by the ordinances.

Section 201 has to do with buildings which are not in a condition that makes the structure itself a menace to life, but rather with conditions which may or may not in themselves be dangerous but which are violations of the Code and require attention so as to prevent accidental destruction to the property or injury to life and limb.

In this respect Section 201 is readily distinguishable from Section 202, which includes cases where the condition of the building itself is likely to bring on a catastrophe, in which event the ordinances authorize the most drastic action, even to the extent of vacating the premises, as has been pointed out above. On the other hand, such matters as are covered by Section 201 cannot be dealt with in this summary manner.

When we analyze Section 201 we find that paragraph (a) requires the Commissioner of Buildings on his own initiative to inspect buildings and structures occupied or frequented by large numbers of people in order to ascertain their safety, strength and facilities for egress. If he finds any violations, his method of procedure, as expressly pointed out, is to make return of same to the Law Department for prosecution. No alterations or repairs are mentioned in this paragraph; it is simply intended to prescribe a way of enforcing the ordinances relating to such buildings.

We next find that, under paragraph (b), when his attention is called to conditions which may be dangerous or render a building insecure or to any violation of the ordinances, it is the duty of the Commissioner of Buildings to make an examination of the building complained of. If he finds such representation true, before prosecuting, he is supposed to give notice in writing for the purpose of giving the offending party a chance to comply with his orders. Then, in case of non-compliance, his method of procedure is again pointed out to be to place the matter into the hands of the Law Department for prosecution. While the wording of this paragraph indicates that the action of the Commissioner is to be instigated by a citizen, it would be a very narrow construction of the paragraph to hold that such action cannot be taken on complaint of one who is not a citizen or on the Commissioner's own initiative, especially in view of the requirements of Section 200½ and other sections which make it the duty of the Commissioner of Buildings to enforce all the building ordinances. The words referring to the representation of a citizen are, therefore, construed by us to mean that in case of such complaint it is imperative that the Commissioner should act; that is to say, the ordinance requires him to make the examination, and to proceed with notice and suit, if the situation warrants it.

Further analyzing Section 201, we find paragraph (c) is as follows:

“(c) It shall be unlawful to continue the use of such building until the changes, alterations or repairs found necessary by the Commissioner of Buildings to make such building or part thereof safe or to bring it into compliance with this chapter, shall have been made.”

As stated above, we do not interpret this paragraph as authorizing the summary vacation or closing up of a building on account of violations of the ordinances, unless they are of such a character as to render the building unsafe within the meaning of Section 202.

We arrive at this conclusion from the fact that the methods of procedure in all cases short of the unsafe conditions contemplated in Section 202 are pointed out in para-

graph (a) and (b) of Section 201 respectively, and no such summary action is authorized there, while the method of procedure is also pointed out in the case of the more dangerous conditions mentioned in Section 202, and there such summary action is expressly authorized. It is manifestly absurd to hold that the city council found it necessary to authorize this procedure by express words in case of "such an unsafe condition as to endanger life," while in the next preceding section it left such authority in less urgent conditions to be inferred from words susceptible of a different interpretation.

Therefore, having in mind the plain meaning to be drawn from an examination of the other paragraphs of Section 201, Section 202 and other sections of the Building Code, we hold that the words "it shall be unlawful to continue the use of such building" do not empower you to close up a building. We interpret them in the light of Section 720, prescribing penalties. This section provides that an offender "shall be deemed guilty of a separate offense for every day on which such violation, neglect or refusal shall continue."

Consequently the paragraph under consideration, which ought properly to have been made a part of the preceding paragraph, means that when the commissioner has found it necessary to prescribe changes in pursuance of the preceding paragraph, the continued use of the building, after due notice and before the making of such changes, is unlawful and may be punished by a fine for every day it is so used.

Paragraph (d) of Section 201 relates to the power of the Commissioner of Buildings to pass upon questions arising under the Building Code, and does not relate to the matters you inquired about. We, therefore, do not pursue the analysis of this section any farther.

The building ordinances are so framed that it is possible in most cases, to compel compliance through the agent or tenant. It is only occasionally that such contingencies arise as you mention in the particular cases which we will now take up, where it would be manifestly unfair to punish the tenant for the dereliction of the owner, and where no agent or person in charge can be reached. Even in such

cases, however, if all other means fail, it may become necessary for the city to pursue its remedy against the tenant and the latter must trust to the clemency of the judge hearing the case. By bringing such pressure on the tenant, he will undoubtedly vacate the premises. The failure of the landlord to maintain the premises in conformity to the Code would in most cases be sufficient cause for rescinding his lease, but while that is the general rule it will not hold in all cases.

In regard to the premises at No. 530 North Morgan street, which is a four-story tenement house, where the owner refuses to construct a fire escape after being notified repeatedly, it seems that the owner lives at Oak Park. No difficulty presents itself in that case, because suit can be brought in a justice court at Oak Park, or in either the County, Circuit or Superior Courts. These courts have as complete jurisdiction in the matter as the Municipal Court would have if the owner was a resident of the city. We recommend that suit be brought before a justice at Oak Park as the simplest and easiest method of procedure.

In the case of the building at No. 501 South 45th avenue, where the owner divided six-room flats on each floor into three-room flats without constructing a brick dividing wall, the same condition exists. This owner is also a resident of Oak Park, and, therefore, can be reached in the same way as the other.

In reference to the building at No. 230-46 North Ashland avenue, while it would appear from the reports of the Fire Department and other papers forwarded to us that the conditions are so bad there that the building might almost be condemned as a nuisance, we recommend that you start suit against the agents of the building. They can be held for most of the violations noted. The tenants can also be held for some, and, if necessary, they can be proceeded against.

It may be that both the agents and the tenants will be able to evade liability. If so, the most practicable way of proceeding would be by bringing the matter before the city council, which would probably condemn the building as a nuisance. Suit could be brought in the foreign jurisdiction

where the owner lives, but that would entail unnecessary expense to the city and probably be an ineffective way of handling the situation. The ordinary method of attachment, which could be invoked by a private party, is also impracticable, since there is no provision made by the city for giving bond in such cases.

Hence, while there seems to be some difficulty in the way of an action, it is not insurmountable, and in any event the situation is within the control of the city council, which may condemn the place as a nuisance and order it closed up.

No general plan of action can be prescribed for cases of this kind, where the person liable is a non-resident. The Law Department, in each case, must handle the situation in the manner best adapted for the particular occasion.

We return herewith the files of your department relating to each of the above three cases.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JUNE 20, 1912.

MR. WILLIAM D. CASSIDY, Clerk, Municipal Pension Fund.

Dear Sir:

An investigation made by this office shows that the civil service commissioners have classified the position of lamp-lighter as one which comes within the provisions of Section 1, Division K, of the civil service rules and regulations, in full force and effect for the year of 1911, which reads:

“Skilled Labor Service. Positions requiring knowledge of a trade or useful art, or requiring special or mechanical skill.”

The civil service commission, under its powers derived from the state legislature, has the right to classify positions of this character, and such classification is binding upon your board.

The provision of the act exempting laborers from the

benefits of the municipal pension fund, unless such laborer shall within six months after the act becomes in force and effect give written notice of his desire to participate in the benefits thereof, applies only to *common laborers*. It is therefore compulsory upon the comptroller to make the required deductions from the salary and wages of lamp-lighters.

Respectfully submitted,

J. F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JUNE 21, 1912.

HON. JOHN McWEENY, General Superintendent of Police.

Dear Sir:

Your letter in relation to the junk yard located at 1701-1705 North Western avenue, was referred to the writer for an opinion.

You state in your letter that you are informed that the proprietor of this place, Mr. A. Cohn, declares that he is running a wholesale scrap iron business, and therefore does not have to take out a license for same, also that he does not deal in rags or bottles or any other metal except iron.

You further state that the place is about 300 feet from a building occupied by the German assembly as a church and you ask whether or not Mr. Cohn is required to take out a license under the city ordinances.

In order to satisfy ourselves with regard to the kind of business that is run on the premises, we sent for the proprietor. He stated that he deals in scrap iron exclusively and that he buys only from junk dealers. He admitted that he has made occasional purchases from peddlers, but says he will not do so in the future if this department rules that purchasing from peddlers would make him fall within the classification of keepers of junk shops who are required to take out licenses. We have made further inquiry, and are fully convinced that his representations are true, and that

this man is a wholesale dealer in junk and is not a keeper of a junk shop as defined by the ordinances.

In this connection we call your attention to the fact that it is a very common thing at present for keepers of junk shops to claim that they are wholesale dealers in junk and do not require licenses.

It is true that in the case of *City of Chicago v. Lowenthal*, 242 Ill. 404, it was held that a concern which occupied a six-story building and whose purchases were practically all in carload lots, was not a keeper of a junk shop, but we do not read this decision as meaning that every person in the junk business who buys from junk peddlers is a wholesale junk dealer and does not require a license.

The other matter mentioned in your letter has no reference whatever to a license fee. You state that the junk yard run by Mr. Cohn is within 300 feet of a building used for church purposes. This is a question entirely distinct and independent from the question of a license fee and also from the question as to whether Mr. Cohn is a wholesale dealer in junk or the keeper of a junk shop.

The statute authorizes the municipality to control the location of junk yards, and when a person runs a junk yard, whether he is a wholesale dealer or the keeper of a junk shop, he must conform to the ordinance. This ordinance prohibits a junk yard within 400 feet of any building used for the purpose of a church.

It is true that another concern is now contesting the question of whether the building that you refer to is a church or not and the matter has not yet been decided by the courts, but inasmuch as all parties should be treated alike in this particular, and this department has ruled that the place in question is a building used for the purposes of a church, it is proper for you to notify the proprietor of this place that his junk yard is within 400 feet of a building used for church purposes and will have to be removed.

Respectfully yours,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

JUNE 24, 1912.

DR. G. B. YOUNG, Commissioner of Health.

Dear Sir:

In a recent letter addressed to the Corporation Counsel, you inquired whether the city can establish a hospital for contagious diseases without regard to frontage consents; also whether the city could make use of the wards of a hospital already established temporarily under the frontage consents which the said hospital had secured previous thereto. Our answer to both of these questions is in the affirmative.

The city in establishing a contagious disease hospital is exercising a governmental function of the highest order,—one that the law recognizes as among the first duties of a municipality; it therefore acts in its governmental capacity as distinguished from its corporate or private capacity. The ordinances requiring frontage consents in such cases do not apply. In proceeding thus it will be necessary, however, for the municipality to take action through its City Council by ordinance, order, or resolution, whichever is most appropriate,—otherwise, if established by city officials without express authority of this kind, the ordinances apply, and although a city official may claim to be acting for the city, he is not absolved from the duty of obeying the ordinances until appropriate action has been taken by the City Council.

Respectfully submitted,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKBITH,

Acting Corporation Counsel.

JUNE 24, 1912.

HON. EUGENE BLOCK, Chairman, Committee on Local Transportation.

Dear Sir:

I have your communication of the 22d instant wherein you ask for an opinion as to whether the consent of the School Board or the City of Chicago is necessary in computing certain frontage consents on Emerald avenue.

From your communication it appears that the verification report of the Commissioner of Public Works on frontage consents along Emerald avenue from 79th street to 320 feet south contains the following notation:

“Note: City of Chicago in trust for schools owns 150 feet, which is allowed in this certification but not signed for.”

Clause 90 of Section 1, Article V, of the Cities and Villages Act, provides in part that—

“The City Council * * * shall have no power to grant the use of or right to lay down any railroad tracks in any street of the city to any * * * electric * * * or other railroad company * * * except upon the petition of the owners of the land representing more than one-half of the frontage consents of the street, or so much thereof as is sought to be used for railroad purposes, and when the street or part thereof sought to be used shall be more than a mile in extent, no petition of land owners shall be valid unless the same shall be signed by the owners of the land representing more than one-half of the frontage of each mile and of the fraction of a mile in excess of the whole mile measuring from the initial point named in such petition, of such street or of the part thereof sought to be used for railroad purposes.”

In considering whether or not the school property should be counted in determining the amount of frontage the owners of which have petitioned for a street railway, the property owned by the City of Chicago in trust for schools must undoubtedly be taken into account. The situation of this property from a legal standpoint is not materially different from the property held by the various park boards. In determining whether park frontage must be obtained in a petition of property owners consenting to the location of a dram-shop, the Supreme Court of this state has decided that such property must be included, and the fact that it is owned by a public body for the benefit of the people, does not exclude the necessity for the obtaining of such frontage consents. (*Theurer v. People*, 211 Ill. 296; *Dexter v. Sprague*, 22 R. I. 324.)

From the views expressed in the above mentioned cases,

the frontage consents by the city must be included in the total frontage under consideration.

Very respectfully,
JOHN W. BECKWITH,
Acting Corporation Counsel.

JUNE 27, 1912.

HON. EUGENE BLOCK, Chairman, Committee on Local Transportation.

Dear Sir:

Replying to your favor requesting draft of an amendment to the pending ordinance for the Riverdale extension of the lines of the Calumet and South Chicago Railway Company, I beg to say that in order to comprehensively deal with the situation we have requested a map of the entire route of the proposed extension to be prepared by the Map Department of the city and have been informed by the officials of that department that the map is in the process of making.

Your communication requests an amendment to the pending ordinance along the lines suggested by the president of the Calumet and South Chicago Railway Company authorizing the company and board of engineers

“to place the capital account expenditures in constructing the temporary line outside the city limits, from 130th street to 134th street, and providing that in event hereafter the line as now proposed to be constructed should be abandoned and a new line built in lieu thereof, that the entire amount of expenditure for the construction of the new line should go to capital.”

The authority of the city council in granting permits or licenses to street railway companies is limited to the construction, maintenance and operation of street railway lines within the city limits.

The ordinances of February 11, 1907, contemplate only an urban system of street railways. Owing to the exigencies of the situation it is necessary in the present instance for the extension in question to pass out of the city limits at Indiana avenue west of the right of way of the Illinois Central Railroad Company and to re-enter the city at the intersection of 134th street with the east line of the right of way of the Illinois

Central Railroad. The portion of the line to be built beyond the city limits is not and cannot be effected or authorized in any way by an ordinance of the city council. To the extent that it affects street railway lines beyond the city limits, it is *ultra vires*.

The city council of the city, therefore, has no right or authority to legislate in any manner concerning the construction of lines beyond the city limits, nor has it any authority to dispose of the expenditures incurred in the construction of such lines in any manner whatsoever.

Should the city acquire the lines of railway of the company by purchase in the future, the portion of the railway beyond the city limits would not and could not be included in the amount of property purchased. The city cannot buy outlying street railway property under the Mueller law.

Clause 3 of Section 20 of the ordinance to the Chicago City Railway Company February 11, 1907, provides, in part, that in case the city shall purchase and take over the street railway system of the company, then it shall pay for the same the aggregate of items, one of which is—

“The cost of reconstruction * * * and of the construction of new lines, extensions, * * * and other additions to property actually paid by said company at and prior to said purchase by said city * * *.”

This provision refers to new lines or extensions within the city limits only.

It would be absurd to charge to capital account items of expenditure for construction of lines, when the city could never acquire these lines by purchase. The entire system of accounting under the ordinances was framed and is designed to keep an accurate account of expenditures for permanent betterments of the company incurred by it, in order to determine an equitable purchase price should the city desire to take over the properties.

It is quite apparent that the city cannot charge up an item to be later paid for by it when the acquisition of the property represented by the item of expenditure would be impossible.

I am therefore of the opinion that any amendment drawn along the lines suggested by the president of the railway

company, authorizing charging to capital account expenditures in the construction of the temporary line outside of the city limits, cannot be legally done.

His suggestion as to charging the cost of a new line, built in lieu of the one outside of the city limits, is superfluous. If the line is built within the city limits, under the provisions of the ordinance, the expenditures for the extension will be taken care of by the provisions of that ordinance and charged to capital account in the manner therein provided.

Yours respectfully,

JOHN W. BECKWITH,
Acting Corporation Counsel.

JUNE 27, 1912.

HON. JOHN McWEENY, General Superintendent of Police.

Dear Sir:

With reference to your communication of June 25, 1912, on which you desire an interpretation of the word "fireworks," in the ordinances heretofore passed by the city council, I beg to state that this matter has been assigned to me.

I find that on July 17, 1911, the council passed an ordinance (Council Proceedings, p. 1062), which is as follows:

"No person shall at any time discharge or set off anywhere within the City of Chicago or have in his or her possession for such purpose, any toy pistol, toy gun, toy cannon, blank cartridge, or any fireworks, fire crackers, torpedoes, bombs, rockets, spinwheels, fire balloons, Roman candles, detonating canes or ammunition therefor, or any substances or articles of an explosive nature designed or intended to be used as fireworks; provided, however, that the Mayor of the City of Chicago may permit or order the public display of fireworks by permit in writing issued by him as hereinafter provided. And provided further, that pyrotechnic displays of fireworks may be given at any time in licensed amusement parks under the supervision of the licensee and at least one representative of the police department of the City of Chicago."

Section 950 of the Chicago Code of 1911 is as follows:

"It shall hereafter be unlawful for any person, firm or corporation to keep or expose for sale any fireworks, fire crackers, torpedoes, bombs, squibs, rockets, spin-

wheels, fire balloons, Roman candles, detonating canes or ammunition therefor, or any substances or articles of an explosive nature designed or intended to be used as fireworks, without a license issued for that purpose as hereinafter provided."

The above section was amended by an amendment on June 3, 1912, which is as follows:

"And it shall also be unlawful for any person, firm or corporation, who has been licensed, to keep or expose for sale any substances or articles referred to in this section, to sell any such substances or articles to any person, firm or corporation who is not in possession of and does not exhibit to such seller a permit issued by the Mayor of the City of Chicago relative to discharging, setting off or having in one's possession any of the substances or articles mentioned in this section as provided by the ordinances of the City of Chicago now in force or which may hereafter be passed."

As I understand it, you specifically desire to know as to whether or not "sparklers" and "red fire" come within the term "fireworks" as covered by the above ordinances. With reference to "sparklers," Mr. Charles M. Haft, of this office, on May 6, 1912, in an opinion, addressed to Messrs. N. Shure Company, Madison and Franklin streets, Chicago, Illinois, stated that he did not interpret "sparklers" to fall within the category of fireworks, with which opinion I desire to concur.

On the broad question of what fireworks is, 51 N. Y., *Jones v. Firemans' Fund Ins. Co.*, p. 318, the court there legally defines fireworks.

"'Fireworks' as used in a contract of insurance against loss by fire on a stock of fireworks and merchandise, hazardous and extrahazardous, meant such fireworks as were in the prohibition excepted, or might by permission be kept for retailing. As fireworks are of various kinds, and in different degrees dangerous, it is not to be presumed that the agreement to insure against loss was intended to cover an article so specially hazardous that the insured had no right to store it."

The Century Dictionary defines "fireworks" as follows:

"A contrivance of inflammable and explosive materials combined in various proportions for the purpose of

producing in combustion beautiful or amusing scenic effects, or to be used as a night signal on land or sea, or for various purposes in war."

Webster defines "fireworks" as follows:

"A device for producing a striking display of light or a figure or figures in plain or colored fire by the combustion of materials that burn in some peculiar manner."

I therefore must conclude that with reference to red fire or sparklers as being within the term "fireworks" prohibited by ordinance, the test is what the council had in mind at the time they passed this ordinance with reference to what they intended to prohibit. So far as I am able to gather, the reasons for the passage of the ordinance were to prohibit the sale of any sort of an inflammable or combustible explosive which was dangerous to life or limb; secondly, to prohibit the sale of any explosive which had a tendency to cause fire, and thirdly, to prohibit the sale of any explosive which would violate the anti-noise ordinance.

Sparklers, red fire, etc., I am informed by the Police and Fire Departments, are not considered dangerous to the life or limb, nor do they cause any noise; and they have very little tendency to cause fire. It therefore would appear that sparklers, red fire, etc., which are not mentioned specifically as being a species of fireworks while numerous other articles, which are species of fireworks, are mentioned in the ordinance of July 17, 1911, are not covered by that ordinance, and Section 950, nor the amendment, which itemize other species of fireworks, such as torpedoes, bombs, etc., do not mention sparklers or red fire, etc.

In short the council's idea with reference to fireworks was some substance or article of an explosive nature designed or intended to be used as fireworks, and I cannot conceive how red fire or sparklers, which can be used with safety, could be considered as fireworks under the ordinances.

I therefore desire to state that any substance which is not of an explosive nature, which does not endanger life nor

limb and which has no tendency to cause fire, can be considered fireworks as meant by the ordinances now in effect.

Yours respectfully,

HARRY J. GOWDY,

Assistant Corporation Counsel.

Approved:

MACLAY HOYNE,

Acting Corporation Counsel.

JUNE 28, 1912.

HON. CHAS. M. THOMSON, Chairman, Committee on Buildings,
etc.

Dear Sir:

In a letter of the Commissioner of Buildings, addressed to your committee some time ago, your attention was called to the nine theaters located higher than the first floor, which are still being operated in the city under a classification warranted by ordinance and designated as "existing Class IV-b theaters."

You referred this matter to this department for an opinion as to whether the city council has the power to declare such theaters nuisances and to close them.

The letter of the commissioner points out the dangers which remain after such theaters comply fully with all provisions of the ordinances as they now exist relating to Class IV-b theaters which are enforceable against them. He shows that these places were not originally designed as public theaters, that the interior construction of the buildings containing them is entirely of combustible material, with wood floors and wooden interior stairways, partitions and roofs, that the auditorium are located at various heights ranging from 15 to 30 feet from the ground, that the seating capacity is large, as high as 930 and 925 respectively in two of them and 800 in one which is located on the third floor, and he expresses the opinion that the use of such places as theaters is extremely hazardous.

The question which we are called upon to decide when narrowed down to the precise point involved, is whether the city, by reason of the fact that these theaters were lawfully

established originally, is compelled to allow indefinitely, the operation of places which are admittedly dangerous to the public, and which must perforce become more and more dangerous as the buildings become drier and weaker.

When it is remembered that one of the most important duties of a municipality is the preservation of the lives and health of the public, there seems little doubt as to the power of the city council in the premises. To conclude otherwise would be in effect to say that, once they have been permitted to exist lawfully, the municipality is powerless to remove conditions that tend to bring on catastrophies.

The power of the city in this respect is derived from various grants, chief among which are its general powers, in regard to buildings, its power to regulate places of amusement, and its power to declare what shall be a nuisance and to abate the same.

Nuisances are generally classified as nuisances *per se*, things which are nuisances in some localities or under certain conditions only, and things which by their nature are noxious, dangerous or otherwise objectionable, which may be nuisances but as to which there may be a difference of opinion in impartial hands.

Dillon on Mun. Corp., 5th Ed., Sec. 690.

Langel v. Bushnell, 197 Ill. 20.

Carthage v. Munsell, 203 Ill. 478.

Our Supreme Court, in acquiescing to the above classification, defined the power of the municipality in relation to each of these as follows:

“Nuisances may thus be classified: *First*, those which in their nature are nuisances *per se* or are so denounced by the common law or by statute; second, those which in their nature are not nuisances but may become so by reason of their locality, surroundings or the manner in which they may be conducted, managed, etc.; *third*, those which in their nature may be nuisances, but as to which there may be honest differences of opinion in impartial minds.

The power granted by the statute to the governing bodies of municipal corporations to declare what shall be nuisances and to abate the same, etc., authorized such bodies to conclusively denounce those things falling with-

in the first and third of these classes to be nuisances, but as to those things falling within the second class the power possessed is only to declare such of them to be nuisances as are in fact so."

Leugel v. Bushnell, 197 Ill. 20.

The places in question fall peculiarly within the third classification given above. That is to say, they are objectionable because certain elements of danger inhere in them, not depending on their locality, or the class of buildings surrounding them, or the character of the population in the neighborhood, or the class of people frequenting them, or even the way in which they are conducted.

There may be an honest difference of opinion as to whether the danger to life and limb is so great in a theater that to locate it on the second or third floor constitutes it a nuisance. But there can be no question of the right of the city council to exercise its discretion and to declare it such, and, having done so, its action will not be interfered with by the courts.

As was said in a case falling within the same rule:

"But in doubtful cases, where a thing may or may not be a nuisance, depending upon a variety of circumstances requiring judgment and discretion on the part of the town authorities in exercising their legislative functions, under a general delegation of power like the one we are considering, their action, under such circumstances, would be conclusive of the question."

North Chicago City Ry. Co. v. Town of Lake View, 105 Ill. 212.

Harmison v. City of Lewiston, 153 Ill. 313.

It will thus be seen that the power of the city council extends to such a situation as the Commissioner of Buildings has outlined, and if reasonably exercised, it will withstand attack. Only an abuse of the power, such as ordering the buildings torn down or ordering them closed for all purposes, would be subject to an adverse ruling from the courts. (Dillon, 5th Ed., Sec. 688.)

It would be a reasonable exercise of the power to prohibit such places from being used as theaters, but to permit them to be used as assembly halls.

"Under these powers (to declare what shall be nui-

sances, etc.) we think the town possessed the authority so to order the use of private property within its limits as to prevent its proving dangerous to the safety of the persons and property of citizens."

C. B. & Q. R. R. Co. v. Haggerty, 67 Ill. 113.

Quoted approvingly in:

Patterson v. Johnson, 214 Ill. 481.

The right of the municipality to control the erection of buildings considered dangerous and to compel their destruction or removal has been the subject of much contention, and many decisions appear in the authorities concerning same. But as these relate principally to buildings which have become dangerous by reason of their structural defects or the material in same, we do not consider it necessary to discuss these authorities. Suffice it to say that even the right of summary destruction and removal has been upheld where ordinances have defined the methods of construction and the limits within which certain buildings may be built, despite the fact that the buildings in question were not nuisances *per se*.

Wood on Nuisances, Sec. 746.

King v. Davenport, 98 Ill. 305.

Baumgartner v. Hasty, 100 Ind. 575.

"While the power of a city to declare what shall be a nuisance is not arbitrary, yet if a building which is not in itself a nuisance has, by reason of its locality, surroundings or the manner in which it is conducted or managed, become a nuisance in fact, the city has power to declare it to be a nuisance."

Sings v. City of Joliet, 237 Ill. 300.

As pointed out above, the principle governing the matter under consideration is somewhat different from that relating to the buildings which have been declared nuisances in the decisions we cite. In the present instance it is only the use to which the buildings are put and not the buildings themselves that constitute the nuisance. Our purpose in citing the authorities last referred to is to show that the police power may go further than is here proposed in depriving persons of property and still be within constitutional limits.

It is therefore within the province of the city council to

determine whether these theaters constitute such a menace to life and limb that they may be condemned as nuisances, and if, in the exercise of its judgment, it comes to this conclusion, an ordinance prohibiting their use as theaters will in all probability stand the test of validity.

We return herewith the letter of the Commissioner of Buildings, above mentioned.

Yours truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

MACLAY HOYNE,
Acting Corporation Counsel.

JUNE 29, 1912.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

You forwarded to this department a letter from the General Superintendent of Police in which he calls attention to difficulties which the police have experienced through the lack of municipal control of the operation of private ambulances, and asks that an ordinance regulating same be enacted.

In his letter the chief calls attention to certain abuses that have existed for some time in cases where abortion have been performed and private ambulances have been surreptitiously used. He also mentions the fact that one of the street railway companies has installed private ambulances, and that the department has not always received prompt information in cases handled by them. One case in point was cited where the railway officials explained the delay in reporting to the police by saying that the driver of the ambulance was arrested for speeding.

A copy of certain correspondence between the general claim agent of this company and the coroner of Cook County, which was sent by the former to the General Superintendent of Police in explanation of the position of the street railway company in the matter, was also submitted to us. From this it appears that the coroner called for an official expression

on the subject, and a defense of the attitude of the company was given in response thereto. You asked to be advised in the matter. We assume that there is no question in your mind as to the propriety of regulating private ambulances in view of the statement made by the General Superintendent of Police concerning the abuses practiced in the past, and that your inquiry was more particularly directed to the new situation arising out of the use of private ambulances by the street railway company.

The correspondent mentioned above, alluding to articles which have appeared in the newspapers, points out that a great deal of criticism concerning this action has been indulged in. The principal points raised both in this correspondence and by the newspapers referred to, are that persons are kidnaped when injured by street cars, that they are rushed to favored hospitals which are not always of high standing that some of these hospitals are actually run or controlled by the company, that an unfair advantage is taken of injured persons by having them treated by surgeons whose sympathies are with the company and who would belittle their injuries for purposes of settlement and by surrounding them in their defenseless condition with an atmosphere and influences that militate against the successful prosecution of claims that may arise from the injury and that the company's agents fail to notify the police.

The memorandum which the claim agent puts forth as a defense, while intemperate as to language, undertakes to answer all the above points. It is claimed that arrangements have been made regardless of expenses or questions of liability to extend to injured persons the quickest and best relief that humanitarian instincts could demand, that the so-called "favored" institutions were selected on account of the skill of the medical attendants, and that the automobile ambulance service is for the benefit of the patient. It is also claimed that the police are notified of accidents in all cases where they are not on the scene.

While it may be said that the street railway company is active because it seeks to reduce its losses, there is no lawful way of entirely curbing its method of handling such

cases. It certainly has the right to care for its injured if it sees fit to do so.

In the case of a private person, it would be regarded as a shocking evidence of indifference and brutality if he should fail to assist any one that he has injured. Thus, if a person in an automobile accidentally runs over a child, he would be regarded as utterly heartless if he refused to take the child to the nearest hospital in his machine.

The law takes cognizance of such humanitarian instincts, both in defining punishment for offenses and in mitigation or aggravation of damages. Can a different rule be applied to a corporation, even though the corporation may be moved to take a humane course from motives of gain? We can conceive of no logical argument that would lead to such a conclusion.

The street railway company may be prevented from conducting a hospital for the treatment of patients not connected with the operation of its cars, but as to persons who are injured thereby, it is even legitimate for the company to run its own hospital.

Again, it may be possible, if found desirable, to hamper the work of the company in this respect. Ordinances can be passed which will prevent the removal of an injured person more than a certain distance by its employes or persons acting for it, which will require such employes to notify the police before notifying the claim department, and other ways may be conceived whereby the activities of the company in this regard may be materially diminished. But in the main, it cannot be prevented from ministering to the injured where the injury results from the operation of the railway.

The law, therefore, cannot be invoked to prohibit the use of ambulances and hospitals to care for injured persons by the street railway company. It can, however, place some protection about the person who is picked up in an injured condition. It can prevent him being taken to a place that he does not want to go to if he is conscious and able to protest, and it can require immediate reports, so that relatives may look after the interests of a person so injured.

Having in mind the fact that you would probably con-

ceive the need of a regulative ordinance for private ambulances from the showing made in the letter of the General Superintendent of Police, and believing that the last two suggestions will meet with your approval, we have prepared and forward herewith a draft of an ordinance embodying these features. If the same does not cover all that you desire in this regard we can alter it upon receiving word from you.

We also return herewith the letter of the General Superintendent of Police and the copy of the correspondence above referred to.

Yours respectfully,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

JULY 1, 1912.

HON. HARRY E. LITTLER, Chairman, Committee on Harbors,
Wharves and Bridges, City Council, Chicago.

Dear Sir:

In reply to your request that an opinion be given your committee as to all steps required to be taken in connection with the construction of piers No. 1 and No. 2 on Study Map No. 1, dated November 24, 1911, of the Harbor and Subway Commission, to acquire title

- (a) to submerged lands,
 - (b) to riparian rights,
 - (c) to rights of way and extension of Illinois and Indiana streets to the present shore land of Lake Michigan,
- we submit the following:

SUBMERGED LANDS.

Section 1 of an act of the General Assembly, approved June 10, 1911, provides that

“Every city in this state shall also have the right, power and authority, and such right, power and authority is hereby granted to use, occupy or reclaim all such submerged lands under the public waters of the state within the limits or jurisdiction, or bordering on such

city, as may be necessary or appropriate for any of the purposes hereinbefore in this act enumerated, and the right or license herein granted to cities to use, occupy or reclaim such submerged lands shall be superior to and shall take precedence over any similar right or license heretofore granted to any person, firm, private or municipal or public corporation other than a city (insofar as such right has not been exercised), at the time when such city by ordinance, as to lands, therein particularly described, shall elect or determine to use such right or license, and no person, firm, or private corporation, at any time, and no municipal or other public corporation, other than a city, except as in this act or under the terms of any other law of this state may be provided, shall, after this act goes into force and effect, construct a harbor, canal, wharf, dock, pier, slip, levee or any other harbor facility or improvement over or upon such submerged lands within the limits or jurisdiction of any city, or over or upon any public waters bordering thereon, without first securing the consent of the city council of such city."

By ordinance passed November 20, 1911, Council Proceedings, p. 1787, the city elected, in accordance with the authority granted by the act above referred to, to acquire, own, use, occupy and reclaim all the submerged lands under the public waters of the State of Illinois within the limits or jurisdiction of or bordering on the City of Chicago particularly described as follows:

"including the main stream from its mouth to the forks and the north branch and south branch to the city limits, including all the waters, submerged lands and made lands within said river and its branches aforesaid and said harbor district No. 1 shall also include all the territory, including the waters, submerged lands and made lands, lying and being within the following boundaries, to wit: Beginning on the south side of the Chicago River at its point of confluence with Lake Michigan, thence extending in an easterly direction parallel to Randolph street extended, over the waters of Lake Michigan, a distance of one (1) mile; thence extending in a northerly direction, along an imaginary line running at right angles to said Randolph street extended, to a point where said imaginary line bisects the north side of Chicago avenue extended; thence extending in a westerly direction along the north side of said Chicago avenue extend-

ed to the present shore line of said Lake Michigan; thence extending southerly following said shore line of Lake Michigan, to the Chicago River and thence across said river to the place of beginning."

The Chicago Dock and Canal Company claims title to the land north of the Chicago River as far as Indiana street abutting Lake Michigan. Section four of its charter gave it

"The power to inclose, make and protect, and also to erect and construct, on their own lands and on the shore and in the navigable waters of Lake Michigan (so that they do not in any manner obstruct or prevent the free navigation of the same, in front of their own lands and premises, and in front of the premises of such person or persons as may assent to the same), wharves, docks, moles, piers, breakwaters and such other erections, protections, improvements and conveniences for the safety and accommodation of boats and vessels, and the security and advantageous use of their own property, wharves and docks, or for the purposes of convenience in the use and enjoyment of said property by the said company, as the board of directors of said company may deem necessary and proper."

Section four gave the company a license only to construct wharves, docks, etc., in the waters of Lake Michigan.

Morris v. United States, 174 U. S. 196.

Inasmuch as the company had not elected to use the license given by its charter prior to the passage of the Act of June 10, 1911, with reference to the submerged lands as they had existed since the platting of the Peshtigo Dock Addition platted in 1889, hereinafter referred to, and inasmuch as no ordinance of the City of Chicago granting it the right to construct wharves, docks, etc., has been passed subsequent to the passage of said act, and inasmuch as the City of Chicago has by ordinance of November 20, 1911, elected to use said submerged lands, therefore, we are of the opinion that no further steps need be taken by the City of Chicago to use said submerged lands for the purpose of constructing wharves, docks, etc.

RIPARIAN RIGHTS AND TITLES.

The shore lands of Harbor District No. 1 comprise Lots 23 and 24 in the resubdivision of original water Lot 35 and accretions south of the Michigan slip and Lot 7 of the Peshigo Dock addition north thereof.

In connection with this investigation we have considered the opinion prepared under former Corporation Counsel Brundage and the report of the Committee on the Submerged and Shore Lands of Illinois, 1911.

We have also examined all the maps and plats referred to in said opinion and report and have viewed the premises and caused excavations to be made under the supervision of Mr. J. L. Atherton, Jr., engineer, Water Pipe Extension Department, to determine whether the land along the lake shore north of the slip has been filled in artificially or made by natural accretions.

The lands north and south of the slip are claimed by the Chicago Dock and Canal Company.

1. The company's title.

Whatever title the company has to the lands in question must be derived from one or both of the following sources:

(a) By virtue of its charter from the State of Illinois. (Private Laws 1857, page 499.)

(b) By virtue of common law accretions.

Rules of Law Applicable.

A grant of rights or franchises by the state without consideration is strictly construed against the grantee.

Mills et al. v. County of St. Clair, 7 Ill. 197, 227.

Mills et al. v. County of St. Clair, 49 U. S. 568 (8 How.).

Illinois Health University v. The People, 166 Ill. 171, 178.

London v. Mayor, etc., of the City of New York, 93 N. Y. 129.

Pearsall v. Northern Ry. Co., 161 U. S. 646.

An owner of lands abutting on Lake Michigan is entitled to whatever additions are made to his lands by reason of natural accretions imperceptibly made at any moment of time, but such owner has no right to build piers or "wharf

out" into the lake for the purpose of making land or increasing the boundary of his premises nor has he the right to do any act which will produce that result. Lands covered by the waters of the lake belong to the state and a riparian owner has no right, by any device whatever, to extend his boundary line beyond the water's edge and any act which produces such a result inflicts an injury on the rights of the state and may be inquired into and abated in a court of equity on the application of the Attorney General.

Revell v. The People, 177 Ill. 468, 483.

Accretions formed by artificial means such as filling in or building out land or by wrongful obstructions in the waters of the lake which cause the action of the winds and waves to form additions to riparian lands, do not belong to the riparian owner, but are the property of the state. Any structure placed upon the land of the state below or beyond the water's edge in the waters of the lake is a purpresture and may be abated in a proceeding instituted on behalf of the people.

Revell v. The People, 177 Ill. 468, 489.

Sage v. Mayor of City of New York, 154 N. Y. 69.

Any invasion or unauthorized encroachment upon the right of the state to the bed of the lake is a purpresture.

Revell v. The People, 177 Ill. 468, 480.

The possession and enjoyment of lands made by artificial means for a long period of time does not warrant the presumption of a grant, and a mere permissive use cannot be the basis of a claim of an adverse interest.

Morris v. the United States, 174 U. S. 196, 286.

Lambe v. Manning, 171 Ill. 612, 622.

2. The Company Derived No Title by Reason of Its Charter.

Section 4 of its charter gave it

"power to enclose, make and protect and also to erect and construct on their *own* lands and on the shore and in the navigable waters of Lake Michigan (so that they do not in any manner obstruct or prevent the free navigation of the same in front of their *own* lands and premises and in front of the premises of such person or persons as may assent to the same) wharves, docks, moles, piers, breakwaters and such other erections, protections, im-

provements and conveniences for the safety and accommodation of boats and vessels and the security and advantageous use of their *own* property, wharves, and docks, or for the purposes of convenience in the use and enjoyment of said property by the said company."

The words underscored in the above quotation clearly indicate that the legislature in granting the charter had in mind the fact that the State of Illinois owned the lands under the waters of Lake Michigan, otherwise it would not have been necessary to specify three places where such structures might be built, namely,

- "(1) On their own lands, and
- (2) On the shore, and
- (3) In the navigable waters of Lake Michigan."

The part of said section in parentheses expressly provides that such structures should be built "so that they do not in any manner obstruct or prevent the free navigation of the same (Lake Michigan) in front of their own lands and premises," etc., thereby indicating an intention on the part of the legislature to keep the waters of Lake Michigan in front of "their own lands" open to navigation.

Section 4 cannot be construed from any standpoint as a grant of title by the state of any lands under the waters of Lake Michigan. It was a mere license to construct wharves, docks, etc., in its waters.

Morris v. United States, 174 U. S. 196.

Section 5 gave the company

"power to excavate, maintain, preserve and keep open canals, basins, slips and such other ways, with their embankments, supporters and appurtenances, for the entrance of boats and vessels of all kinds *from* the lake and also *from* the Chicago Harbor and River; to levee part of their property, lands and premises as may, by the board of directors of said company be considered necessary and convenient for the profitable use and enjoyment of said company."

This section cannot be construed as a grant of lands and its context seems to apply only to the company's own lands and not to lands covered by the waters of the lake. So far as acquiring title is concerned, it is a limitation upon the rights of the company, but it may be noted, however, that the

company has the right to levee or embank "their property, lands and premises as may * * * be considered necessary and convenient for the profitable use and enjoyment of said company." This right to levee or embank certainly does not include the power to fill in and make land merely for the purpose of reclaiming the same, but must be construed strictly to apply to and include only the corporate purposes as set forth in Section 4 above quoted.

Section 6 gives the company

"power to buy at private or public sale and to *take* and *hold* perpetually, any and all lands that may be necessary for the use and purposes of said company, and the complete execution of the powers hereby conferred upon said company: Provided, the same shall lie and be situated in Kenzie's Addition to the City of Chicago, and shall not exceed in all 50 acres of land exclusive of the land covered by water."

This of course applies to lands owned by third persons and not to lands owned by the State of Illinois under the waters of the lake.

But aside from this, Section 6 presents two important questions for consideration:

(a) The company may take and hold perpetually any and all lands that may be necessary for its use and purposes and the complete execution of its powers.

(b) All such lands shall lie and be situated in Kenzie's Addition to the City of Chicago, and shall not exceed in all 50 acres of land exclusive of the land covered by water.

The first of these is a grant of power to take and hold only such lands as may be necessary for the use and purposes of said company and the complete execution of its powers. Clearly any lands which it might take and hold in excess of what are necessary for its corporate purposes would be taken upon the condition subsequent that the state might claim and enforce at its pleasure either the right to compel the company to dispose of all lands in excess of what are necessary for its corporate use and purposes or its sovereign right to enforce a forfeiture of the company's charter because of an exercise of an excess of corporate power.

Hough v. Cook County Land Company, 73 Ill. 23, 29.

Mott v. Danville Seminary, 129 Ill. 403.

If all the facts, when fully established, should show that the company has filled in upon and reclaimed submerged lands, where such filling in and reclamation has not been necessary and convenient for the profitable use and enjoyment of the company's corporate franchises and property, then we are of the opinion that so much and such reclaimed lands belong to the State of Illinois, since the title of the submerged lands which have been reclaimed was in the state.

3. Land Between the Chicago River and the Michigan Slip.

Investigation discloses that the company has filled in the entire space between the Michigan slip and the Chicago River by artificial means, subdivided it into lots and leased many of these lots to divers persons and corporations for manufacturing, commercial and warehouse purposes, and that a very small portion, comparatively speaking, of this made land is used for purposes of navigation.

When the Michigan slip was constructed there was open water (part of Lake Michigan) between it and the Chicago River for a considerable distance west of the entrance to the present slip. The shore line of original water Lot 35 and its accretion in 1857, when the company was incorporated, extended northwesterly and southeasterly across what is now sub-Lots 13 and 35 of the present subdivision of original water Lot 35 and accretion platted March 17, 1885. Over eleven acres of land now lie east of this shore line of 1857 and between the Michigan slip on the north and the Chicago River on the south. Lots 23 and 24 constitute the eastern portion of this 11-acre tract.

It was necessary to construct some kind of a platform over the open water or a part of it, to provide facilities for docking vessels and unloading freight, but it seems quite clear that it was not necessary to fill in to the extent of 11 acres for the company's corporate purposes since, according to our information, much of this tract has never been used for such purposes.

We are of the opinion that neither the company nor its lessees nor grantees have valid title to this made land. The company's charter conveyed no rights of title in the sub-

merged lands. It limited the company to a license to use the submerged lands for docks, wharves and other structures in aid of navigation. The company was a mere licensee from the state. So much of this made land as is not used by the company for docks, wharves; etc., or in aid of navigation, is the property of the state and the state has the right to cause such part as is not so used to be removed as a purpresture, or to prosecute its appropriate remedy for the recovery of the same.

4. Land North of the Michigan Slip.

At the time the Michigan slip was built, the shore line of this land was west of Peshtigo Court. Since that time this land has been filled in and reclaimed by artificial means. We are informed by Mr. Henry Ericsson, Building Commissioner, that he filled in a considerable part of this land.

Mr. J. L. Atherton, Jr., engineer, Water Pipe Extension Department, at our direction caused twelve holes to be dug on Lot 7 of Peshtigo Dock Addition at the places indicated upon the blue print attached to his report, a copy of which report is herewith submitted and which shows that land at the points indicated was made by artificial means and not by natural accretions. The filling consisted of broken concrete, asphalt paving, cinders and miscellaneous material. At the places where the holes were dug the land is unoccupied and unimproved.

The portion of this land immediately adjoining the slip on the north is a protection to the slip and can be used for the landing and docking of vessels. There are also some freight houses for purposes of navigation adjacent to the slip. Under its charter the company has a license to use this part for the purposes indicated, but a considerable part of this is made land and is occupied by warehouses, a lumber yard, stables, saloons and other business institutions. The remaining portion is neither adaptable to nor has it ever been used, for the corporate purposes of the company. It has been and is the subject of real estate exploitation. It contains no docks, wharves, freight houses, slips or other facilities in aid of navigation.

In the case of the *Chicago Dock and Canal Company v. Garrity*, 115 Ill. 155, the court says at page 168:

“The Chicago Dock and Canal Company is a private corporation created by an act of the General Assembly, approved February 12, 1857.”

And at page 169 says:

“It is thus clear that the property of this corporation is devoted to a *public* use although its ownership is private. The entire business of the corporation is with the *public*. It can own no vessels, and *its property can be used for profit only for the accommodation of the public*. In conferring the power of eminent domain upon it, the legislature gave the strongest possible confirmation of the view that *it is created for public purposes only*.”

The making of by far the greater portion of the land north of the Michigan slip, which has never been devoted to any use whatever, has been a violation of the company's license to construct docks, wharves and other structures in aid of navigation, and has also been a violation of the company's duty to keep the waters of the lake open for navigation in front of its premises, and the private uses to which a large portion of the used land has been devoted constitute a further violation of the company's corporate powers and purposes as conferred by Sections 4, 5 and 6 of its charter and as construed in the case of the *Chicago Dock and Canal Company v. Garrity, supra*.

We are of the opinion that such part of this land as is not used as a protection of the north side of the slip and for docking purposes and freight houses for lake traffic, insofar as the same has been artificially filled in and reclaimed, is the property of the state and that this land also might be removed by the state as a purpresture, or be recovered in a proper proceeding.

We shall next consider whether all the lands, which the company has taken and held or now claims, lie and are situated in Kenzie's Addition to Chicago and whether they exceed in all 50 acres exclusive of the land covered by water. We are of the opinion that all accretions to lands in Kenzie's Addition slowly and imperceptibly formed by natural means

constitute a part of Kenzie's Addition, and further that all such lands as have been artificially made under a legal exercise of the company's corporate powers may likewise be construed to be a part of Kenzie's Addition, but all lands which were formerly submerged but have been filled in and reclaimed by artificial means by the company and which have not been or cannot be, from their nature or location, used by the company for any of its corporate purposes, or which are in excess of the lands which are reasonably necessary for the use and purposes of the company, we are of the opinion, are not, in contemplation of law, a part of Kenzie's Addition. This will include a large portion of the artificially made lands north of the Michigan slip; certainly all artificially made lands north of the south line of Illinois street, if not more.

The natural accretions can reasonably be said to be a part of Kenzie's Addition for the reason that the riparian owner acquires title to these accretions because of the fact that he has title to a portion of the original shore which was a part of Kenzie's Addition as originally platted in 1833. But the title to the submerged lands, which have been reclaimed by the company, originally was in the State of Illinois and since the company, as riparian owner, had no right to fill in and reclaim these lands, it, therefore, acquired no title to them and for a like reason they did not become a part of Kenzie's Addition. These reclaimed lands are the property of the state.

A very important question, however, is: Has the company, at any time since its incorporation, attempted to take and hold in excess of 50 acres exclusive of the land covered by water?

The Submerged and Shore Lands Legislative Investigating Committee, commonly known as the Chipperfield Commission, in Volume II of its report, made in 1911, at page 188 says:

"The company is now possessed of about 60 acres of valuable property, of which nearly all lies outside of Kenzie's Addition."

This committee in Volume III of its report also gives a

list of the lots upon which the company paid taxes in 1909. We have had an abstract made from 1857 down to after the great fire in 1871, showing what lots were acquired during that period by the company, and have had a search made of the tract indexes in the recorder's office down to the present date of all the lots and lands at any time held or claimed by the company. The Harbors, Wharves and Bridges Committee recently ordered a survey of these lands which was completed March 19, 1912. Taking the above list of lots and tracts as disclosed by the search in the recorder's office and the results of this survey, we have ascertained that the company has been attempting to hold since September 17, 1889, the date upon which it made formal claim of record to the Peshtigo Dock Addition, by recording the plat of the same, 51.29 acres of land above the surface of the water, unless it shall be determined that the company's act of platting the Peshtigo Dock Addition amounted to a vacation of Indiana and Illinois streets east of Peshtigo court. We will consider this point later in this opinion.

We attach hereto for reference a map prepared by Mr. Geo. Inman, title expert of the Map Department, showing a portion of the original Kenzie's Addition to Chicago, platted in 1833; Chicago Dock and Canal Company's resubdivision of their subdivision of original water Lot 35 and the accretion thereto, all of Block 8 and accretion, and of that part of Block 19 lying east of Sub-block 2, platted March 17, 1885; also Chicago Dock and Canal Company's Peshtigo Dock Addition, platted September 17, 1889. There are indicated on this map the shore line of 1834, the shore line of 1857, which is the date of the company's incorporation, the shore line of 1885, when the resubdivision above referred to was made, and the shore line of 1889, when the Peshtigo Dock Addition was platted. The shore line of today is the same as that of 1889 when the Peshtigo Dock Addition plat was recorded.

The original lots or tracts acquired by the company after its incorporation lie between St. Clair street on the west and the shore line of 1857 on the east and are shown in white with the exception that certain lots between these

limits which the company has never acquired are shown in black. The accretions and additions between the shore lines of 1857 and 1885 and north of the Michigan slip are shown in red. The land east of the shore line of 1885 and north of the Michigan slip which comprises the present Peshtigo Dock Addition is shown in green. The accretions and additions to original water Lot 35 east of the shore line of 1857 and south of the Michigan slip, and which were platted in the resubdivision of 1885, are shown in yellow. This is the eleven-acre tract heretofore referred to.

It appears from this map that the shore line of 1889 is over 1,400 feet east of the shore line of 1885. Lot 7 of the Peshtigo Dock Addition forms the northeast portion of the company's tract, is rectangular in form, and extends east from Peshtigo court about 1,000 feet to a breakwater at the edge of the lake. This breakwater which forms the eastern boundary of Lot 7 is 514 feet long and about 525 feet of the northern boundary of Lot 7 is formed by another breakwater. Neither the City of Chicago nor the United States government has any record of the building of these breakwaters. Recent inquiry at the offices of Ogden, Sheldon and Company elicited the reply from Mr. Eugene H. Fishburn, "We built them about 1880."

It would seem perfectly clear from the facts heretofore stated, namely, the rectangular shape of Lot 7, the nature of the soil that has been filled in on Lot 7, as shown by the investigation made by Mr. Atherton, and the further fact that over 1,400 feet of land east and west was reclaimed and brought above the surface of the water in the short period of about four years from 1885 to 1889, that the northeast portion of the tract now claimed by the company, and more particularly Lot 7, is of artificial origin, that the last portion of this land reclaimed and brought above the surface of the water is that portion of Lot 7 adjoining upon and contiguous to the two breakwaters forming its eastern and northern boundaries, and that the company at present is attempting to hold land in excess of 50 acres. This excess is to be found in the Peshtigo Dock Addition platted September 17, 1889.

It is a well settled rule that where a corporation is for-

bidden to take or receive lands, such a prohibition goes to its capacity to acquire, and a deed made to it under such circumstances passes no title, such a conveyance being absolutely void. Our Supreme Court has held that where a corporation has been authorized by the legislature of the state to receive or acquire lands to the extent of 10 acres and no more, that any amount in excess of that which is expressly forbidden by the statute cannot be taken and that all conveyances, deeds or other contracts made in violation of this prohibition are absolutely void.

St. Peter's Roman Catholic Congregation v. Germain, 104 Ill. 440, 446.

On principle it would seem then that such a prohibition would be equally effective to prevent a corporation from taking title by any other means, as, for instance, by way of accretion or artificial reclamation.

The language of section 6 of the charter is a limitation as well as an authority and when the Company had acquired 50 acres it had absolutely no power to take title to another square foot of ground. While there is authority *both to take and hold*, the limitation applies likewise *both to the taking and holding* and the corporation is not permitted to take and hold more than the certain specified amount, namely, "in all 50 acres of land, exclusive of the land covered by the water." The provision is an absolute restriction upon the power of the Company to take title to real property in excess of the quantity named.

Matter of McGraw, 111 N. Y. 66, 90.

Cromie v. Louisville Orphans' Home Soc., 3 Bush (66 Ky.) 365.

Wood v. Hammond, 16 R. I. 98.

Gilmer v. Stone, 120 U. S. 586, 594, 595.

Carroll v. East St. Louis, 67 Ill. 568, 575, 576, 578.

Section 12 of the Company's charter hereinafter set forth grants power to it to vacate streets which pass through its land, "provided said corporation shall first purchase all of the land on each side of any street so far as they may use or appropriate same."

The Company has never owned any land on the north side

of Indiana street but has owned land on both sides of Illinois street. In the platting of the Peshtigo Dock addition, Indiana street and Illinois street are only laid out to the east line of Peshtigo court. If this act of the company amounted to a vacation of these streets east of Peshtigo court, then we are of the opinion that when the Company by formal act of platting and recording the Peshtigo Dock addition, September 17, 1889, by which the quantity of its attempted holdings was increased to more than 50 acres, namely, to 51.29 acres, it took no title to the excess of 1.29 acres, and that if the said excess is located along and within the breakwaters bounding said lot 7 on the east and northeast, and if this excess was the last land brought above the surface of the water by said Company it has no riparian rights where these lands border on Lake Michigan, to wit: on the eastern and northern shores of said lot 7. If, however, the recording of said plat and the prior acts of the Company did not amount to a vacation of Indiana and Illinois street, then there is no excess over the 50 acres.

Section 7 as amended February 22, 1861, gave the Company power

“to enter upon, take possession of, hold and use such lots, pieces or parcels of land, in said Kenzie’s addition, or adjacent thereto, as may be needful for the completion of the improvement hereby contemplated, and for the complete exercise of the powers herein conferred.”

and to condemn such lands as are described in section 6, provided the Company could not agree with the owners on the purchase price. The lands referred to as “adjacent thereto” cannot be held to include the submerged lands of the State nor the same after they are filled in and reclaimed as the same has been done by the Company, for the reason that the section provides for the acquisition by payment to the owners therefor or by condemnation. Likewise the condemnation does not apply to any lands belonging to the State of Illinois under the waters of the lake or reclaimed, because if the State intended to grant such lands to the Company, it would have been idle to make any provision for their condemnation. Furthermore, the lands of the State could not be condemned.

Section 11 gave the Company

“power to lease *their* lands for such time and upon such

terms as may be agreed upon between said Company and its lessees. * * *

This section relates to the Company's lands specified in the preceding sections and the power to lease to other persons is restricted to such lands as might be necessary for the use and purposes of the Company, namely, for "wharves, docks, moles, piers, breakwaters and such other erections, protections, improvements and conveniences for the safety and accommodation of boats and vessels and for the security and advantageous use of their own property, wharves and docks" as might be deemed necessary and proper.

EAST ENDS OF STREETS.

Section 12 provided that the Company "shall have power to vacate the streets which pass through *their own* land and shall have power to use and the right to appropriate for their canals and other purposes so much of the east ends of the several streets passing through so much of Kenzie's addition to the City of Chicago as lies between the lake shore and the west line of the land formed by the accretion in said addition and known as 'The Sands': provided, said corporation shall first purchase all of the land on each side of any street so far as they may use or appropriate same."

Only three east and west streets are involved, namely, Water, Indiana and Illinois streets. Water street forms a part of the accretion to original water lot 35 which were subdivided and platted in 1885. This street extends east to the entrance to the Michigan slip and its terminus lies between lots 23 and 24 of the aforesaid subdivision and the city's rights extend to the water's edge.

When Kenzie's addition was platted in 1833, Indiana and Illinois streets extended to the water's edge. When the company in 1889 made a plat of the Peshtigo Dock addition and recorded the same, as above stated, these streets were laid out only to the east line of Peshtigo court, a distance of nearly 1,000 feet from the breakwater which marks the shore of the lake.

We are of the opinion that the Company did not have the right to vacate Indiana and Illinois streets east of Pesh-

tigo court to the lake for the reason that the lands constituting the extensions of these streets to the water's edge had not been and are not applied to any of the uses and purposes set forth in the Company's charter and that the Company had no right to vacate Indiana street for the further season that it has not purchased "all of the land on each side" of said street. The city's right of access to the water's edge along these streets is subject, however, to the rights of the State of Illinois by reason of the wrongful reclamation of the submerged lands of the State.

The foregoing analysis of the charter shows clearly that so far as lands were concerned as distinguished from wharves, docks, piers, etc., the corporate powers of the Company were strictly limited to lands owned, purchased or acquired by it above water and that the State of Illinois made no grant whatever to it of any land under water, but on the other hand required it to construct its docks, wharves, piers, etc., so as not to obstruct the free navigation of the waters of Lake Michigan in front of its premises.

(*Mills et al. v. County of St. Clair*, 7 Ill. 197, 229, 231.

Morris v. United States, 174 U. S. 196, 286.)

In other words, if the construction of its docks, wharves, piers, etc., caused accretion to extend the land out into the lake, it was probably the duty of the Company to remove such accretions so as to keep the lake open for navigation (and it could take no title to such accretions) except insofar as the land formed was necessary for the protection and convenience of such docks, wharves and piers.

RIGHT OF WAY.

As to shore lands to be used by the city for rights of way and in connection with terminal facilities for harbor development, to obviate the possible objection as to the title to the lands in the Peshtigo Dock addition, it may be advisable for the city to obtain a grant of these lands from the State Legislature, since it may be urged that only submerged lands and not artificially made lands were granted by the Harbor Act of June 10, 1911. To remove all doubt as to the meaning of the Act, we, therefore, recommend that an amendment to

said act be procured whereby the city shall have the right, power and authority to use and occupy reclaimed and artificially made lands within its limits or jurisdiction, the title to which is in the State, and that such city be authorized and empowered to make a location by ordinance upon any such reclaimed and artificially made lands for any of the purposes contained in said Harbor Act and to have the right, power and authority to bring and maintain all necessary suits, actions and proceedings in its corporate name against any person, firm or corporation for the recovery of the possession of such reclaimed or artificially made lands.

REVOCATION OF LICENSE.

The House of Representatives of the Illinois Legislature on May 17, 1909, adopted a resolution concurred in by the Senate May 18, 1909, which resolution was in part as follows:

“Whereas, It appears from an examination of the Act (Act of Incorporation February 12, 1857), that the present claims of said company are unfounded and this State never passed or parted with the fee of the made land now in possession of it, but this State simply granted it a mere license or permission to use the waters of Lake Michigan and the submerged lands at her option and said company has for a period of 42 years made no effort to extend its piers further out into the waters of Lake Michigan; now, therefore, be it

Resolved, By the House of Representatives, the Senate concurring herein, that all privileges, rights, and easements used of water and land, as well also all rights of property, real, personal and mixed, that can or may be asserted by said company to the waters of Lake Michigan or to the soil under the same, whether it be to the present made land or easements in the same be and the same are hereby declared to be the property of the State of Illinois, and any license, privilege, easement, claim or franchise now outstanding in said company to the waters and lands of Lake Michigan under or by virtue of its charter under the Act of 1857 creating it are each and all hereby declared forfeited, revoked and annulled; and it is further hereby declared that said company shall, hereafter, possess no further rights, or easements, not enjoyed by the public, in and to the lands and waters of Lake Michigan.”

From the language of this resolution it is apparent that the legislature intended that it should have a retroactive effect relating back to the time when the company made the first illegal exercise of the license granted by its charter and while a court might give it this interpretation, we prefer not to pass upon the question of the operation of the resolution, but to treat the question of the revocation of the company's license from another point of view.

The Constitution of 1848 was in force when the company was granted a charter by special act in 1857. The constitution adopted by the people of Illinois in 1870 provides:

ARTICLE II.

Section 14. "No *ex post facto* law, or law impairing the obligation of contracts, or making any irrevocable grant of special privileges or immunities, shall be passed."

ARTICLE IV.

Section 22. "The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say, for * * *

Granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever."

ARTICLE XI.

Section 1. "No corporation shall be created by special laws, or its charter extended, changed or amended, except those for charitable, educational, penal or reformatory purposes, which are to be and remain under the patronage and control of the state, but the general assembly shall provide, by general laws, for the organization of all corporations hereafter to be created."

Section 2. "All existing charters or grants of special or exclusive privileges, under which organization shall not have taken place, or which shall not have been in operation within ten days from the time this constitution takes effect, shall thereafter have no validity or effect whatever."

SCHEDULES.

"That no inconvenience may arise from the alterations and amendments made in the constitution of this state, and to carry the same into complete effect, it is hereby ordered and declared:

That all laws in force at the adoption of this constitution, not inconsistent therewith, and all rights, actions, prosecutions, claims, and contracts of this state, individuals or bodies corporate, shall continue to be as valid as if this constitution had not been adopted."

From the foregoing provisions it is fairly and reasonably inferable that the special privileges and licenses to whatever extent granted by the special act of February 12, 1857, not previously exercised, could not be exercised by the Chicago Dock and Canal Company after the adoption of the Constitution of 1879 for the purpose of constructing new and additional erections, protections and improvements, for the reason that from its very nature such an exercise partook of the character of a special or exclusive privilege or license. The special charter act conferred a license or privilege, but the exercise of that license or privilege was a matter wholly separate and distinct from the Act itself and depended exclusively upon the law in force at the time of the attempted exercise, or the power conferred upon the company by its charter may be defined to be an unexecuted power which was subject at any time to revocation by the State.

Certainly it would seem clear that whenever a State Legislature grants a right, power, privilege or license to a private individual or corporation in waters or lands which the State holds for the benefit of the public at large, that such right, power, privilege or license is, at any time prior to its exercise, revocable and the State, in its trust capacity for the entire people, cannot be estopped from revoking any such right, power, privilege or license.

While the act itself, as a contract between the State and the company, was and is binding upon the State, insofar as it constituted a contract in this connection, however, it is to be kept in mind that it is not the charter which is protected, but only any contract the charter may contain. If there is no contract, there is nothing in the grant on which the provisions of the federal and State constitutions prohibiting the impairment of contracts can act.

To the extent to which the company had exercised any of its said privileges, powers or licenses prior to the adoption

of the constitution in 1870, the courts may differ as to whether such exercise can be interfered with. But from and after the adoption of the constitution in 1870 it is certainly clear, from the tenor of the above quoted provisions, that the people of the State declared and adopted a public policy embodied in those provisions, wholly "inconsistent" with the doctrine and policy of special privileges that had theretofore obtained under the constitution of 1848 and which operated as a full and complete revocation of all right, license and unexecuted power contained in said charter with the result that the company could not make any new or additional exercise of said privileges, powers and licenses after such adoption in the sense of making any additional wharves, docks, moles, piers, breakwaters, canals, basins, slips, ways, embankments, supporters, etc., in the public waters or in and upon any of the submerged lands of the State.

It is well settled that the contracts which are protected by the federal and State constitutions, against impairment must be founded upon a good consideration. If it be a mere nude pact, a bare promise, to allow a certain thing to be done, it will be construed as a revocable license.

The real questions before us is whether a bare license or an unexecuted power to do certain things in the public waters of the State or in and upon the submerged lands of the State, as set forth in the company's charter, so long as the same remains unexecuted, is within the control and subject to revocation by the legislature or by the people when adopting a new constitution. The answer to this inquiry is that when the company has undertaken to do certain things which were not necessary to the primary object of the grant and not directly and immediately within the contemplation of the parties thereto, to wit: the making and reclaiming of large areas of land which have not been or are not suitable for the corporate purposes of the company, the power conferred by the charter, at least so long as it remains unexecuted, is within the control of the legislature or of the people, and may be treated as a license and may be revoked if a possible exercise of such power is found to conflict with the interests of the public. These grants of licenses and powers contained in the char-

ter were in legal effect subject at all times to the paramount right of the State as trustee for the public and were revocable and in subjection to the sovereign will of the people whenever they should see fit to adopt a public policy inconsistent with the special privileges enumerated. Neither is the State bound by any estoppel or to make any compensation to the company insofar as the company has made or attempted to make an illegal exercise of said licenses and powers. He who accepts a license from the legislature knowing that he is dealing with an agent bound by duty not to impair public rights, does so at his risk and a voluntary expenditure in reliance thereon gives him no claim to compensation. His position is similar to that of a tenant at sufferance.

Stone v. Mississippi, 101 U. S. 814, 816-817.

Pearsall v. Gt. Northern Ry. Co., 161 U. S. 646, 667-672-674.

St. Anthony Power Co. v. St. Paul Commissioners, 168 U. S. 349, 371-374.

Rundle v. Canal Co., 55 U. S. (14 How.) 80, 92-94.

Washingtonian Home v. City of Chicago, 157 Ill. 414, 425-429.

Summarizing our conclusions as above set forth, we are of the opinion :

First. That all artificially made lands, which have not been made in pursuance of a legal exercise of the Company's corporate powers, are not a part of Kenzie's addition to Chicago, and, therefore, did not become the property of the Company because of the limitation contained in section 6 of its charter that its lands "shall lie and be situated in Kenzie's addition."

Second. That if the Company, by the platting of the Peshtigo Dock addition in 1889, has been attempting to hold lands in excess of 50 acres (the limitation provided in section 6 of its charter) it took no title to the said excess.

Third. That the Company took no title to any of the reclaimed lands whether the same are north or south of the Michigan slip, where said reclaimed lands have not been brought above the surface of the water in the exercise of a legal corporate purpose or cannot be, from their nature and location, used by the Company for its corporate purposes,

for the reason that these reclaimed lands have been filled in upon the submerged lands of the lake, the title to which was and is in the State of Illinois.

Fourth. That the title to all of the reclaimed lands, the excess lands (if any) and the said lands not in Kenzie's addition is in the State of Illinois, subject, however, to such street rights of the City of Chicago as have been hereinabove set forth.

Fifth. That since the Company, for the reasons above summarized, is not the owner of those portions of lot 7 of Peshtigo Dock addition along its eastern and northern shore lines, it owns no riparian rights along said shore lines of said lot 7.

Sixth. That possibly the city should procure from the legislature a grant of the reclaimed and artificially made lands for rights of way and terminal purposes and the right to sue any person, firm or corporation for the recovery of the possession of such lands.

Seventh. That the adoption of the Constitution of 1870 had the effect to revoke any special license, privilege or power contained in the Company's charter as to any future exercise of the same.

Hereto attached is a copy of the report of J. L. Atherton, Jr., Engineer, bearing date of October 17, 1911, also blue print based upon survey of March 19, 1912.

Respectfully submitted,

JAMES G. SKINNER,

LORING R. HOOVER,

Assistants Corporation Counsel.

MACLAY HOYNE,

First Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

OCTOBER 17, 1911.

MR. H. L. LUCAS, Supt. Water Pipe Extension.

Dear Sir:

From October 5 to October 10, 1911, test holes were dug near the foot of Indiana street and Illinois street, as indicated on the attached print.

The depth of the holes and the elevation of the water level are shown thereon.

In all cases the fill extended to the bottom of the holes. Holes No. 1, No. 2 and No. 3 being filled with broken concrete and asphalt paving. The other holes were filled with cinders and miscellaneous material. Samples were taken from the bottom of most of the holes and are now in this office.

Yours truly,

J. L. ATHERTON,

Jr. Engr., Water Pipe Extension.

JULY 2, 1912.

HON. RAY PALMER, City Electrician.

Dear Sir:

You ask us whether the City of Chicago could be held liable for any damage which might be done to the property of other persons by electrolysis if the city would allow the railway companies to make connections with the city's water pipe or cable sheath lines.

Your question is general in its nature, but it implies that the permission to use the city's water pipe and cable sheath lines would be the result of a contract with the public service corporations that generate or use the electricity which does the damage.

If such is the case and there is an agreement entered into between such corporations and the city, it is possible to conceive of conditions arising where the city would be held liable for such damage. The likelihood is remote, it is true, but it exists nevertheless.

If it can be shown by the party who has been damaged that such damage has resulted from destructive currents that were deflected through the agency of the city's underground conductors which were loaned for that purpose to the city, it

would follow that the city would be liable even though the primary or moving cause originated under circumstances beyond the city's control and even though the city may have permitted the use of its pipes and cable sheaths without compensation and only for the purpose of preventing greater damage in some other directions.

We apprehend that it would be extremely difficult to prove such a condition and it is quite likely that it would, in almost every instance, escape liability when it was partly responsible therefor, but this does not change the legal aspect of the case and the liability would exist in spite of the fact that it would be hard to prove a case.

Yours very truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JULY 3, 1912.

HON. EUGENE BLOCK, Chairman, Local Transportation Committee.

Dear Sir:

You request an opinion of this department as to two questions:

First, does the passage of an ordinance by the City Council, granting rights to a street car company to operate its lines on a certain street, carry with it the implied consent of the city to the construction of such a line so as to render it unnecessary for the city to grant such consent by means of an executed authority?

Second, the particular property in question for which the city is consenting being held in trust for the school board, can the city consent to the use of the property for a street railway without the independent consent of the Board of Education?

First, the City Council, in passing the ordinance, impliedly gives its consent to the construction of street railway track, and any other consent by the authorized officers of the

city at the direction of the City Council would be superfluous.

The second proposition, while not put as an inquiry in your communication, I may answer by saying that I am informed by the Law Department of the Board of Education that it has always been customary to seek the consent of the school board before authorizing the laying of street car tracks in front of school property, where such tracks did not theretofore exist.

Many school sites are purchased with reference to the location of the site beyond the dangers of street car tracks in the immediate vicinity. The danger to school children from passing street cars adjacent to school houses is too obvious to meet comment. While the City of Chicago is the holder of the legal title to school property, the Board of Education is the beneficial owner and with this status in view, the custom to which I have heretofore alluded of obtaining the consent of the board before the passage of a street car ordinance has doubtless arisen.

Without expressing an opinion as to whether the City Council, in defiance of the wishes of the Board of Education, could grant consent to a street railway company to lay tracks and operate cars in front of school property, I will suggest that the matter be laid before the Board of Education for the purpose of obtaining its consent to this work.

Yours respectfully,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JULY 3, 1912.

TO THE HONORABLE, THE BOARD OF TRUSTEES, OF THE POLICE
PENSION FUND.

Gentlemen:

There has been submitted the question of whether an adopted child of a police patrolman is eligible for pension under the terms of the Police Pension Act.

It appears that in the case in question the child was

adopted in extreme youth and has been so adopted for about nine years during the life of its adopting parent.

The adoption of one person by the other is the creation of an artificial relation between people and is taken from the Roman law, being unknown to the English law. By the common law, therefore, no property descends from the adoptive parent to his child at the decease of the parent. The adoption statute in this state passed in 1874, however, provides by section 5 that "a child so adopted shall be deemed, for the purpose of inheritance by such child, and his descendants and husband or wife, and other legal consequences and incidents of the natural relation of parents and children, the child of the parents by adoption, the same as if he had been born to them in lawful wedlock. * * *"

It is true, as stated by our courts (*Keegan v. Geraghty*, 101 Ill. 39), that "as against the adopted child the statute should be strictly construed, because it is in derogation of the general law of inheritance which is founded on natural relationship, and is a rule of succession according to nature, which has prevailed from time immemorial," nevertheless, I think that in order to give expression to the clause of the statute which makes the adopted child "to all legal intents and purposes the child" of the adopting parent, it must be conceded that for the purposes of receiving this pension the adopted child represents and stands in the place of the adoptive parent.

A case not dissimilar in facts is *Martin v. Aetna Insurance Co.*, 73 Me. 25. There by a life insurance policy in the name of a wife on the life of a husband the amount of the policy was payable to the wife, her executors, etc., if she survived her husband; otherwise to their children for their use or to their guardian if under age. The wife did not survive the husband, and it was held that the adopted children were the sole beneficiaries and the policy became payable to them. It is there said that in legal phraseology the word "child" is not confined to natural offspring; "it may include grandchildren, step-children, children of adoption, etc. Abbott's Law Dic., Art. Child."

In *Power v. Hafley*, 85 Ky. 671, it is said:

"When the statute authorizes a full and complete

adoption, the child adopted thereunder acquires all of the legal rights and capacities, including that of inheritance, of a natural child and is under the same duties. *Humphries v. Davis*, 100 Ind. 280; *Wagner v. Varner*, 50 Ia. 532; *Barnes v. Allen*, 25 Ind. 222; *Burrage v. Briggs*, 120 Mass. 103; *Ross v. Ross*, 129 Mass. 243."

As before stated, the common law made no provision in reference to adopting children, but the civil law made ample provision in that regard; and presuming that the legislature in passing the act *supra* upon the same subject had in view the principles of the civil law, I have consulted the principles of that law in arriving at the construction given by this act. By the civil law the adopted child was "assimilated in many points to a son born in lawful matrimony." The adopted child retained all of the family rights resulting from its birth and there was secured to it all of the family rights produced by the adoption. *Sanders' Justinian*, 103, 105 and 109.

In *Shafer v. Eneu*, 54 Pa. St. 306, it is said "One adopted has the rights of a child without being a child."

It is also said by the text writer in Vol. 1 Ency. of Law & Procedure, 931, upon the subject, "Right of Inheritance by Child" that "the authorities unite in affirming that for all purposes of inheritance from the adoptive parent the adopted child becomes and is the lawful child of such adoptive parent, save in so far as the statute authorizing the adoption may otherwise provide."

The word "child" or "children" usually includes an adopted child:

5 American & English Dic. of Law, p. 1098.

Power v. Hafley, 85 Ky. 676.

Stanley v. Chandler, 63 Vt. 624.

Keegan v. Gerharty, 101 Ill., p. 40.

Bray v. Miles, *supra*.

In the case of *Sewall v. Robert*, 115 Mass., p. 252, in which the language as to the effect of adoption is identical with the language in the Illinois statute, the court held that the word "children" in a deed providing that the income from an estate was to be paid to the grantee for life and upon his death to his executor in trust for the benefit of any "child or children," included an "adopted child."

While, as far as my research has led, I have been unable to find a case where the adopted child was seeking the pension of its adoptive father, yet I am inclined to think that the consensus of judicial decision is to the effect that the applicant in this case is entitled to a pension. This case, however, is to be considered solely with reference to the facts surrounding it, and nothing herein said or left unsaid is to be taken as an intimation that in a case differently circumstanced (as where there were minor children of the body born in wedlock surviving the deceased officer as well as an adopted child or children) there would be any right of the adopted child to the pension. Strangers in blood to the deceased cannot be given by any doubtful implication rights to the exclusion of those born in lawful wedlock. Such a case is not presented here, however, and this opinion should be considered as strictly applicable to the case here presented.

I take notice of the fact of the adoption in the present case having continued for a long period of time and being totally devoid of any facts or circumstances tending to show any fraud on the part of the adopting father in making the adoption with the purpose of securing a pension for the child after his death. The question of fraud or its absence in this and cognate cases must always be considered as it cannot have been the purpose of the legislature to enable a childless father in his old age to adopt young children simply for the purpose of obtaining a pension for them after his death.

The question is one of first instance, so far as I am aware, in the history of pension boards since 1903, and it would be very desirable to have the question definitely settled by a judicial decision.

In view of the hardship of compelling the applicant to go into court for a decision in the matter before a pension could be obtained, I hardly feel authorized in advising the board to withhold the pension and compelling the applicant to bring suit, being of the opinion hereinbefore expressed, that in this

particular case the law favors the right of this applicant to a pension.

Yours very truly,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JULY 8, 1912.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

The following question has been submitted to this department for an opinion:

“The city owns a piece of property, Lot A, purchased with corporate funds, and also another piece, Lot B, purchased with water funds, and sells both pieces. Can the money received from the sale of both pieces be used to purchase a site for a municipal building other than one to be used for water works purposes.”

On February 13, 1863, there was adopted by the general assembly an act entitled,

“An act to reduce the charter of the City of Chicago and the several acts amendatory thereof into one act, and revise the same.”

Private Laws of 1863, pages 40, 140, 145-6, Sections 13, 29 and 32 of which provide as follows:

“Section 13. For such expenditures, pertaining to the supply of water to the said city as are hereby authorized, the said city shall have power to borrow, from time to time as the Board of Public Works and the Common Council of said city shall deem expedient, a sum of money not exceeding five hundred thousand dollars; and said board shall have power, by and with the approval of the Common Council to issue bonds, pledging the faith and credit of said city, for the payment of the principal and interest of said bonds; but no bonds shall be issued until the Common Council shall have approved of such issue, by a vote of a majority of all the aldermen by law authorized to be elected; and all bonds issued by said board, before they shall be binding upon said city, shall be marked ‘approved’ by the mayor and clerk of said city, under the seal of said city, and such signature and seal

shall be conclusive evidence to the holder of said bonds of the fact of such approval; provided, that all sales of water loan bonds may be issued by said board shall be made only by the comptroller of said city, who, on making such sales, shall deposit the proceeds thereof with the city treasurer, to the credit of the Water Fund, and shall file with the said board a duplicate receipt of the said treasurer, for the amount of such deposit; provided, also, that all funds derived from the sale of said water loan bonds, or from water rents, or otherwise, for the water works of said city, shall be exclusively used and appropriated by said board to the objects and purposes pertaining to the water supply of said city, herein specified, nor shall the same, or any part thereof, be used by the said board, or by the said city, for any other purpose."

"Section 29. If there shall be an annual income or revenue in any way, from the water works of said city, greater than is needed to pay the interest of the bonds issued for their construction, and to pay the current expenses of the works, and for maintaining them in thorough repair, then the said board shall have power to direct such excess of revenue to be used in the purchase of the outstanding water loan bonds, or in making such additions to the water works of said city as shall have been approved by the Common Council, or to direct such surplus funds to be invested in the purchase of other bonds of the City of Chicago. The annual report of said board shall specify, in full, what amount of surplus funds shall have been invested, and the nature and amount of the respective securities held by them. The annual report of said board shall also show the amount of water loan bonds outstanding, and all debts outstanding on account of the water works, and the amounts due from parties to the city, for the water works, and shall accurately and clearly exhibit all the expenditures of the said board, on account of the same, which statement shall be certified by the commissioners of said board, under oath."

"Section 32. All accounts pertaining to the water works of said city shall be kept separate and distinct from the accounts pertaining to other departments of said board; and all moneys deposited with the city treasurer on account of the water works shall be by him kept separate and distinct from all other moneys, as the water fund, and shall only be applied for the uses and purposes for which the same are received; and such moneys shall be held by the treasurer of the city as a special fund, separate and distinct from other funds; and he shall be

deemed guilty of embezzlement if he shall pay out such moneys for any account other than that belonging to such water fund, and shall be liable to indictment for so doing."

On April 10, 1872, the general assembly adopted the general act providing for the incorporation of cities and villages throughout the state. (Revised Statutes, 1874, p. 211.) On the 23d day of April, 1875, the City of Chicago became incorporated under the provisions of the General Incorporation Act.

Section 6 of said act provides:

"That all laws or parts of laws not inconsistent with the provisions of this act, shall continue in force and applicable to any such city or village, the same as if such change of organization had not taken place."

Sections 13 and 32 of the Charter of 1863 have not been repealed and are not inconsistent with or repugnant to the provisions found in the General Incorporation Act of 1872.

People v. Hummel, 215 Ill. 71.

In the above cited case an attempt was made by the city to draw from the water fund certain moneys on deposit with the city treasurer as part of the water fund. The treasurer refused to honor the warrants and mandamus was brought compelling so to do. The Supreme Court in denying the writ holds that the foregoing provisions of the Charter of 1863 are still applicable and in force in the city and that there still exists

"the requirement that the water fund shall be kept separate and distinct and shall be appropriated only to the objects and purposes pertaining to the water supply of the city."

The theory of the creation of maintenance of the water fund seems to be that water taxes, rates or assessments are for the purpose of and limited to the necessity of supplying water to the inhabitants of the city for fire protection, etc., and extension of the water system and not for the purpose of conducting and using such water works system with a view to profit or to devote the surplus, if any, to any other governmental purpose, and that such water rates or assessments shall be at the lowest rate consistent with the economical

conduct and obligation of maintaining and operating the water works system.

If the water funds can not be used for purposes other than those connected with the water works system, it is difficult to perceive how funds arising from the sale of property purchased with water funds can be devoted to such extraneous uses. If the water fund property is no longer necessary for its original uses it seems to be the plain intent of the law that it may be sold and the proceeds either used for the extension of the water system or for reducing the water rates charged the inhabitants.

This conclusion is strengthened by the language in Section 13 quoted above,

* * * "that all funds derived from the sale of the said water loan bonds, or from water rents, or *otherwise*, for the water works of said city, shall be exclusively used and appropriated by said board to the objects and purposes pertaining to the water supply of said city, herein specified, nor shall the same, or any part thereof, be used by the said board, or by the said city, *for any other purpose.*"

We reach the conclusion, therefore, that where funds are derived partly from the sale of property, a portion of which is corporate property and a portion water fund property, such funds can not be used in the erection of a building disconnected with purposes pertaining to the water supply of said city.

Yours respectfully,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JULY 8, 1912.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

On July 1, 1912, an order was recommended for passage by the City Council providing that proposals for bids (for garbage reduction plant) should be submitted of two descriptions.

One: "Bids on the basis of using a site provided by the City;" (within the city limits).

Two: "Bids on the basis of the bidder supplying the site, etc., of his own, located outside the city limits." (C. P. 925.)

It has been thought advisable to amend item one by providing that the city shall furnish a site outside the city limits. The question arises in view of this suggestion as to whether for purposes of establishing a garbage reduction plant, the city may own and hold real estate beyond the city limits.

Judge Dillon, Mun. Corp., 5th Ed., Vol. 3, Sec. 980, while laying down the rule that:

"Municipal corporations being created chiefly as governmental agencies, and for the attainment of local objects merely * * * cannot purchase and hold real estate beyond their territorial limits,"

says, however:

"The author is, however, of the opinion that there are purposes for which a corporation may, without special grant, purchase and hold extra territorial lands, as for a pest house, cemetery, park, and the like objects of a municipal character."

The rule thus stated in the text is sustained in *Schneider v. Manasha*, 118 Wis. 298. In that case the municipality sought to establish a stone quarry without its corporate limits for the purpose of obtaining therefrom raw material from which to manufacture crushed rock for the purposes of street paving. There was no express charter power so to do. The court says:

"The rule that a city cannot exercise its governmental authority outside its city limits has nothing to do with the case at hand. This court has recognized that a city may exercise its mere right to own and use property for legitimate city purposes outside its boundaries. * * * It seems sufficient to say that, in the main, the cases hold that municipal authority in a governmental sense cannot be exercised outside the limits of a municipality. * * * It is also in harmony with the view that municipal ownership may reach beyond the corporate limits, as held in the cases to which we have referred."

In *Chambers v. City of St. Louis*, 29 Mo. 543, 574, a devise had been made to the City of St. Louis of certain extra territorial lands in trust for the benefit of the poor of the city. It was contended that the city was incompetent to take and hold such lands as were beyond the municipal boundaries. The charter granted the city the right to hold extra territorial lands for certain specific purposes and it was contended that the enumeration of these purposes excluded all others not named. The court decided that the city was capable of receiving and executing the trust and holding the lands in pursuance thereof.

In the Matter of Application Mayor, etc., of City of New York, 99 N. Y. Reports 569 (a case of peculiar interest by reason of the fact that Judge Dillon himself contended therein for a broader definition of the city's powers) the City of New York was about to extend its jurisdiction over certain lands in Westchester County for the purpose of establishing and maintaining municipal parks. The application of Commissioners to acquire the property was resisted on the ground that the acquiring of the land beyond the city limits would be an unconstitutional expenditure of municipal funds. The court in upholding the right of the city to acquire and hold grounds for park purposes beyond the city limits, says:

"For the preservation of the public health a city or village may certainly purchase land beyond its boundaries for a hospital or pest house, and so remove the danger of infection. Cities and villages planted upon navigable streams may have granted to them ferry rights and own and control them. Are we to say that it is not a city purpose of one city nor a village purpose of a village to buy and own land for slips or landings or ferry houses on the opposite shore because beyond their own boundaries and in another town or county? * * * The truth is that neither in authority, nor in the legislative practice, nor in the common sense of the question is there any basis for declaring that there can be no true and sound municipal purpose which reaches beyond the corporate lines. We are sure that the enterprise under consideration does not fall under a constitutional ban because it is in part to be executed outside of the city limits."

In *Lester v. Mayor, etc.*, 69 Miss. 87, land beyond the

corporate limits was devised to the corporation in trust for park purposes, the court against the contention that the holding of such property was *ultra vires*, laid down the rule that:

“All acts of municipalities, by which parts of the sovereign power of the state delegated to it, must, of course, be performed within the territory over which the power is delegated; but a right to own property is not a sovereign right. One state may own land in another, but it can exercise no governmental control over it. * * * So, a city owning a park without its limits could exercise over it only those rights and powers which spring from ownership, but it does not follow that because it may not be sovereign it may not be owner.”

In *City of Somerville v. City of Waltham*, 170 Mass. 160, it is held that a city may hold land for a gravel pit beyond its corporate limits.

In *Hafner v. St. Louis*, 161 Mo. 34, it was held that although there was no express power in the city to hold or receive land for purposes beyond its corporate limits, yet the city could so hold such property, it not being prohibited by its charter and it being necessary for the carrying out of one of its proper corporate functions and duties.

The same doctrine is affirmed in *Haeussler v. St. Louis*, 205 Mo. 656.

We think from the authorities cited, that the doctrine laid down by Judge Dillon is a correct one and that for purposes such as the establishment of a garbage reduction plant, one essentially necessary for the health of the city, extra territorial land may be held by the city. For such a governmental purpose as establishing a new ward it is evident that the city's authority is confined within the corporate limits. But in cases like the one under consideration, I am of the opinion that the order in question may be amended so that bids may be submitted on the basis of a site being provided by the city outside of the city limits.

Yours respectfully,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JULY 10, 1912.

HON. CHARLES M. THOMSON, Chairman, Committee on Buildings and City Hall.

Dear Sir:

At the last meeting of your committee you requested me to give you an opinion as to whether it would be proper for the City Council to take up *seriatim* the various buildings in which theaters are operated over the first floor level, and condemn such as it considered unsafe as nuisances, leaving the others to continue to operate. Some members of the committee also requested an opinion as to what constitutes a nuisance, especially with reference to this particular subject-matter. I apprehend from the nature of the questions asked, that there is some confusion as to the meaning of the word nuisance in law, and that the question is directed principally to the definition of the same. I will therefore answer the latter question first.

In its literal sense a nuisance may be said to be "anything which works hurt, inconvenience or damage, or which essentially interferes with the enjoyment of life or property." 29 Cyc. 1152. While this may be considered a broad definition, it does not convey fully the legal significance of the term, since it is not necessary that a person shall be actually harmed before a thing or condition can be regarded as a nuisance. Any use of property in a public place which endangers the safety of the people, as the negligent keeping of explosives or the keeping of ferocious animals is a nuisance. It is quite possible that such maintenance of a nuisance may never result in physical injury to anyone and yet the nuisance exists.

The following definition of a public nuisance taken from one of the text writers has been generally recognized from Blackstone to the present day:

"A public nuisance is a violation of a public right, either by a direct encroachment upon public rights or property, or by doing some act which tends to a common injury, or by omitting to do some act which the common good requires, and which it is the duty of a person to do, and the omission to do which results injuriously to the public."

Wood on Nuisances, section 17.

We are accustomed generally to speak of things as nuisances which are offensive to the senses, but there are many other things that do not particularly affect the sight, smell, taste or hearing of the public that are readily recognized as such and have been regarded as such by the law. Thus, keeping open a cellar door, so that persons walking on the highway might fall into it, is readily distinguishable as a nuisance, although it does not affect the senses.

The subject which has received the most thorough airing by the courts along this line is the question of the erection of frame buildings in populous neighborhoods. A frame building is recognized as anything but a nuisance in its proper place, but when such buildings are erected in neighborhoods where they are a menace to other property, they are in fact nuisances. Therefore, when a municipality has authority to establish fire limits and to abate public nuisances, it can in case a frame building is built contrary to the ordinances summarily remove same. This principle is upheld in all the decisions bearing on the subject and has been frequently recognized by the courts of our state.

King v. Davenport, 98 Ill. 305.

Sings v. City of Joliet, 237 Ill. 300.

Baumgartner v. Hasty, 100 Ind. 575.

Wood on Nuisances, Section 746.

In the case of *C. B. & Q. Ry. Co. v. Haggerty*, 67 Ill. 113, our Supreme Court held that under the power to declare what shall be considered as nuisances a municipality had the right to regulate the speed of railway trains and declared that it "possessed the authority so to order the use of private property within its limits as to prevent its proving dangerous to the safety of the persons and property of citizens."

It will therefore be seen that although property used as a theater is not on a highway and may not be offensive to the senses, it can still be used in such a way that the safety of the public is endangered thereby. If it is so used, and the City Council, upon due investigation and in the exercise of its judgment and discretion, finds it to be so used, it may be condemned as a nuisance as explained in a former opinion.

This brings me to the other question concerning the nec-

essity of a general ordinance. On this point the rule that ordinances must be general and uniform in their application to the classes of persons affected, holds good. A municipality may award a special privilege or grant to an individual, but when it undertakes to exercise its police powers it must do so by ordinances which apply to all situated the same way alike; there must be no discrimination. It cannot single out a certain thing belonging to one individual and say that it shall be unlawful and permit a similar thing on the part of another who is situated the same way.

One of the leading cases on this point is the *City of Richmond v. Dudley*, 13 L. R. A. 587. In that case a city ordinance for regulating the storage of inflammable or explosive oils was held unconstitutional because it reserved to the Common Council the right to grant or refuse permission to keep and store such oils according to its discretion without fixing any rule for determining the conditions under which such oils may be kept.

It is only one of the numerous cases which may be cited to establish the rule in such cases, which has been stated as follows:

“An ordinance which permits one person to carry on and occupy within municipal limits, and prohibits another, who has an equal right, from pursuing such business is unconstitutional.”

Cooley Const. L. 243.

A large number of similar cases are quoted from in the Indiana decision above referred to, and others may be found in Wood on Nuisances, section 745.

It is unnecessary to dwell at length on any of these authorities, because the rule is absolute as laid down above. While it is true, however, that municipalities cannot discriminate, it is possible to so legislate that such of the theaters in question as are regarded safe can be placed in a classification of their own. Or, in other words, the requirements of an ordinance regulating the use of same for theatrical purposes may be so worded that its requirements can be met by such as are safe, while those that are unsafe would fail to meet such requirements.

As long as there is a reason for such a classification or

discrimination, it will stand the test of validity, and there can be no better reason for permitting certain places to operate and others not to, than to show that those are permitted to operate that are safe, while others are not.

The court in the case of *City of Lake View v. Tate*, 130 Ill. 247, points out a way in which this can be done, in the case of regulating the speed of railway trains, as follows:

“Where one railroad runs through a densely populated part of a city, where a high rate of speed of its trains would be extremely dangerous to persons and property, and another railway runs through a portion of the same city where there are but few inhabitants, and where it is improbable that injury will happen to any person who is in the exercise of ordinary care, an ordinance making a discrimination as to the speed at which the trains of the two roads may be run can hardly be said to be unreasonable.

But when no such disparity of circumstances is shown, making it necessary to apply different regulations to the different roads, an ordinance which limits the speed of the trains on one road and leaves the other to run through the city without such limitation, will be unreasonable, and therefore void.”

It would be difficult to express in better form or more apt language the precise limitation upon your authority in the present instance than in the language used above.

The conclusion to be drawn from the above therefore is that the city council has ample power in the premises but must so exercise same that if any one of those apparently discriminated against comes within the provisions of the ordinances, he may have the same privileges as those whose places are allowed to operate.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JULY 10, 1912.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF CHICAGO.

Gentlemen:

On the 4th day of April, 1912, your honorable body passed an order directing the Law Department to investigate the records of the Board of Review for the purpose of obtaining information concerning alleged discriminations in the valuation of property subject to taxation, and to take such legal steps as may be deemed advisable and necessary to bring about not only a just valuation of property, but also the payment of back taxes by property owners who have escaped their just burden of taxation in past years.

It is true, as stated in the preamble of the order, that the constitution of the State of Illinois provides that the revenue system shall be administered in such manner that every person and corporation shall pay a tax in proportion to the value of his, her or its property.

However, it is equally true that the constitution provides that the value of taxable property shall be ascertained by some person or persons to be elected or appointed in such manner as the general assembly shall direct.

Pursuant to this mandate of the constitution the general assembly has enacted a revenue law under the provisions of which the valuation of property for taxation in Cook County is made by a board of assessors whose acts are subject to revision by a board of review.

Nowhere in the constitution or in the laws of the state do I find any warrant for the assumption that your honorable body may exercise jurisdiction in the premises.

While it is a matter of common knowledge that the revenue law as well as its administration are capable of vast improvement, this department is constrained to hold that the city is without legal capacity to bring about a betterment of existing conditions.

However, while your honorable body is powerless to rectify existing abuses, it may, nevertheless, exercise its right of protest on behalf of the small property owners of the city, who are the main sufferers from unjust taxation.

With this purpose in view I now submit for your information, the following facts which draw attention to what may be considered one of the most glaring instances, and in point of amount involved, the most important case of unjust discrimination now tolerated in the administration of our revenue system.

The revenue law provides that all real estate, including the stations and other buildings and structures thereon, other than that denominated "railroad track," belonging to any railroad, shall be listed as lands or lots in the county where it is located.

The same is true of all personal property with the exception of what is known as "rolling stock," which latter, together with "railroad track" and "capital stock," is assessed by the State Board of Equalization, on schedules furnished to the board by the auditor of public accounts, to whom they are annually returned by the various railroad companies in the state for each county. The "personal property" and "real estate" assessed by the local taxing boards are shown in what is known as schedules "C" and "D," respectively.

According to the records of the State Board of Equalization for 1911, the total value of railroad property assessed in Cook County on schedules "C" and "D" is as follows:

Personal property	\$1,192,093
Lands, 1,978 acres at \$121.14 per acre.....	239,609
Lots, 1,654 lots at \$2,621.90 per lot.....	4,336,620

Total \$5,768,322

The Board of Equalization reduced this valuation to the sum of \$5,287,847. This latter amount, then, constitutes the sum total of railroad property in Cook County, subject to assessment by the local taxing boards.

The railroad property in Cook County classed as "railroad track" and "rolling stock" was, in 1911, assessed by the State Board of Equalization at \$36,420,451. Capital stock and franchises escaped assessment in the case of all railroad companies except a few lines, mostly electric.

Thus we find as the net result of the activities of the various boards administering the revenue system in the year 1911, that all property owned by railroad companies in Cook County has a taxable value of \$41,708,298.

In order that your honorable body may be better able to judge of the extent of real estate owned by railroads in the heart of the city, I have had prepared by the map department the map herewith transmitted, of the district bounded by Chicago avenue, 22d street, Lake Michigan and Halsted street.

The steady acquisition by railroad companies of lots and lands in all parts of the city and county will eventually result in still higher taxes upon residence property, unless real estate and other property owned by railroads shall be made to bear its just burden of taxation.

The duty of bringing about this salutary result lies with the taxing boards who surely cannot go wrong if they follow the plain words of the constitution.

In addition to this a revenue law more suitable to present day conditions, or at least appropriate amendments to the present law, might be suggested to the general assembly at its next session. This would be a fruitful subject for thoughtful investigation at the hands of a committee of your honorable body.

Respectfully submitted,
NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JULY 10, 1912.

HON. HENRY ERICSSON, Commissioner of Buildings.

Dear Sir:

You have asked this department for an opinion as to whether a garage may be located within two hundred feet of the grounds owned by the University of Chicago. The question is whether such grounds come within the prohibition of the ordinance passed July 17, 1911, which forbids the

construction of such a building "within two hundred feet of any building used as and for a hospital, church or public or parochial school, or the grounds thereof."

We had occasion very recently to pass on a question similar to this and held that an industrial school for girls which was partly maintained through the payment of tuition by the state was not a public school within the meaning of that term as used in the ordinances of the city. Originally the term "public school" was understood to be synonymous with "common school" but more recently a broader interpretation has come in vogue. The following is a fair definition of what a public school is under the more liberal definition given to it at present:

"Public schools are the schools which municipalities or districts are required to maintain, or authorized to maintain, although not required to do so as a part of the system of common education, and which are open and free to all the children and youth of the municipalities or districts in which they are situated, who are of proper age or qualifications to attend them, and which derive their support entirely or in part from money raised by a general state, county or district tax."

35 Cyc. 811.

We would therefore be disposed to hold that high schools, normal schools and universities supported by the state come within the definition of the term public schools as used in the ordinances. We do not however look upon a private institution like the University of Chicago as a public school, even though it is a very large institution of a public character, and in spite of the fact that for many purposes it would have to be regarded as a public institution by your department. In other words, the term public school should be disassociated from the idea that it is merely a place open to the public, and should be limited in this instance to an institution that is supported by the public.

The parties in question having, according to the statement submitted to us in connection with your letter, obtained the necessary frontage consents, including that of the board of directors of the university, and being otherwise within

the terms of the ordinance referred to, have a right to a permit authorizing them to locate this garage on the site proposed.

Yours truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JULY 10, 1912.

HON. EUGENE BLOCK, Chairman, Committee on Local Transportation.

Dear Sir:

Replying to the letter of H. H. Evans, secretary, dated June 1, 1912, transmitting letter of M. C. Buckley, traction expert, to the chairman of the Committee on Local Transportation, asking an opinion of the Corporation Counsel as to the right of elevated railroads to store their cars on their structures, we beg to reply as follows:

In the letter to the Local Transportation Committee dated May 29, 1912, Mr. Buckley complains of the storing of cars by the Chicago & Oak Park Elevated Company east of Kedzie avenue and by the South Side Elevated Company on 63d street near Stoney Island avenue. Mr. Buckley informs us that both of these two points where cars are stored are not, over privately owned property but over public streets of this city. For the purpose of this opinion we shall assume this to be correct.

While it is true that regulations pertaining to the storage of cars on privately owned lands might be considered an unwarranted interference of private business, yet, we believe that the storage of cars on public lands of the city presents a different situation, especially where the city is given express power to make regulations pertaining to such matters.

The authority which the city council is given to regulate the use of space over streets is as follows:

“The city council may also regulate the use of space over the streets, alleys and public places of the city and upon payment of proper compensation to be fixed by ordinance may permit the use of the space more than twelve

feet above the level thereof.” (Sec. 5, Par. 193aq, Ch. 24, Hurd’s R. S., 1909.)

It is our opinion that under the foregoing power (unless otherwise provided for in the ordinance granting the right of way to the elevated railroad companies) the city has power to make all needful and necessary regulations with reference to the use of the elevated structures when over streets, alleys or public places of the city.

Referring to the ordinances of the Chicago and Oak Park Elevated Company, as well as to the ordinances of the South Side Elevated Railroad Company, for the purpose of ascertaining what the provisions are with reference to the rights and powers of the companies as to their tracks or right of way, we find that Section 11 of the ordinance to the Lake Street Elevated Railways Company, passed November 24, 1890, expressly provides:

“That said tracks are not to be used for any other purpose except for the operation of cars for the transportation of passengers within the City of Chicago.”

And that under Section 7 of the ordinance to the South Side Elevated Railroad Company, dated March 26, 1888 (amended as to 63d street April 7, 1892):

“That rights and privileges hereby conferred are upon the further express condition that said elevated railroad shall be exclusively used for the transportation of passengers and mails.”

It will be observed that in neither of the foregoing provisions is authority given to either the Chicago & Oak Park Elevated Railroad Company or to the South Side Elevated Railroad Company to store cars upon their structures when the same are built over streets, alleys or public places of the city, and in our opinion, such storage of cars is without warrant of authority.

Besides it is a familiar rule of construction that whenever a doubt arises as to the construction of an ordinance granting privileges or powers, such doubt should be resolved in favor of the municipality and against the person or corporation claiming the privilege or power.

Black on Interpretation of Laws, p. 316.

Blair v. City of Chicago, 201 U. S. 421.

In the last mentioned case the court cited Binghampton Bridge, 3 Wall. 51, where it is said:

"The principle is this, that all rights which are asserted against the state *must be clearly defined and not raised by inference or presumption*; and if the charter is silent about a power, it does *not* exist. * * *"

Our conclusion is that the City of Chicago can pass ordinances containing reasonable regulations with reference to the storage of cars upon elevated structures whenever such structures are built over the streets, alleys, or public places of the city.

Respectfully submitted,
MAX M. KORSHAK,

Approved:
WM. H. SEXTON,
Corporation Counsel.

JULY 10, 1912.

HON. G. B. YOUNG, Commissioner of Health.

Dear Sir:

In answer to your inquiry of the 8th instant, with reference to the method of procedure for the abatement of a rendering plant within one mile of the corporate limits of the city, I am of opinion that the following proceedings may be had in the premises:

1. The Municipal Court has jurisdiction if the defendant or one of them, if there is more than one, can be found in the City of Chicago. If the offender is a corporation, service may be had upon any officer thereof residing in the city.

The fine may be imposed under Section 1341 or Section 1430 or both. Under the proviso of Section 1341 you are authorized to summarily abate the nuisance in case of neglect or refusal of the owner or occupant, after 24 hours notice in writing to do so.

2. You may also proceed under Section 221 of the Criminal Code of Illinois (Hurd, 1908), which provides as follows:

"It is a public nuisance:

8. To erect, continue or use any building or other place for the exercise of any trade, employment or man-

ufacture, which, by occasioning noxious exhalations, offensive smells or otherwise, is offensive or dangerous to the health of individuals, or of the public.”

“The penalty on conviction is a fine of not to exceed \$100, and for a subsequent offense a like amount and not to exceed three months in the county jail. The court may order the sheriff to abate such nuisance, after the first conviction at the expense of the defendant. (Section 222.)”

If you decide to proceed in the latter manner, the State's Attorney should be given all the facts and asked to proceed against the offender.

In view of the jurisdictional question involved I consider a proceeding under the state law the safest method.

Very truly yours,

NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JULY 12, 1912.

HON. ALBERT J. FISHER, Chairman, Committee on Local Industries:

Dear Sir:

I have investigated the matter of alleged street and alley encroachments by the Chicago & Western Indiana Railroad Company along its right of way, which was referred to this department by your committee, together with the report enumerating the same, submitted to the city council with the communication of the Commissioner of Public Works, of October 29, 1910, and beg leave to report that the following ordinances have been examined with a view of determining with what authority all of the streets and alleys set out in the report are occupied by said company.

1. Ordinance granting permission to Joliet and Chicago R. R. Co., to lay down and maintain one or more railroad tracks through Grove street to the north line of North street (16th), passed by the Common Council of the City of Chicago, January 5, 1857.

This ordinance provides that the company may occupy not to exceed 24 feet in width of Grove street. These tracks are apparently operated by the Chicago & Alton R. R. Co.

2. Ordinance granting permission to the Chicago, Madison and Northern R. R. Co., to lay down and maintain one or more tracks upon the eastern half of Grove street, using the existing tracks only, or on land east of or adjacent thereto to 16th street, passed by the City Council of the City of Chicago, August 1, 1889.

3. Ordinance granting permission to the Chicago and Western Indiana R. R. Co., to lay down and maintain one or more tracks on Stewart avenue, beginning at the south line of the Town of Lake, thence north not to exceed 2,000 feet on Stewart avenue; thence northerly through the alley east of Holland road to Wallace street where the north line of school house lot intersects said street; thence north on or along Wallace street across the right of way of Chicago, Rock Island and Pacific R. R. thence northerly over land to be acquired by said C. & W. I. R. R. Co. until it crosses Halsted street, and as far north as the center line of S. 28, T. 38, N. R. 14 and no further,—passed by the trustees of the Town of Lake, September 5, 1879.

This would bring the right of way to the center line of 75th street.

4. Ordinance granting permission to the same company, to lay down and maintain one or more tracks beginning at Auburn, *the present terminus of the road*, thence north on Wallace street to the north line of said town,—passed by the board of trustees of the Town of Lake, October 10, 1879.

This brings the right of way to 39th street.

5. Ordinance, amending ordinance of October 10, 1879, by more clearly expressing the intent of said ordinance as to Wallace parkway and for the purpose of limiting the use of Wallace street south of 49th street.

“From a point near Auburn, the terminus of the line northwardly on Wallace street to Wallace parkway; thence on said parkway to the north line of Beck’s park; thence north on Wallace street to or near 49th street; thence by a proper curve to a point on the west side of Stewart avenue, or any land the company may acquire,

and crossing 47th street at a point not more than 250 feet west of Stewart avenue,—thence north along Stewart avenue to the north line of said town, upon any land the company may acquire, using the street or alley between Layton street and 45th street, and adjoining Stewart avenue; the tracks on Wallace street to be laid east of its center line and not nearer than 6 feet to the east line of said street.

If the company shall construct a brick sewer on Wallace street it may occupy seven feet in width of said street west of the route above described making in all 34 feet in width.” (Passed by the Trustees, November 7, 1879.)

6. Ordinance amending Section 2 (right of way) of ordinance of November 7, 1879, passed September 8, 1880. (In all other respects the ordinance of November 7, 1879, is kept in force.)

7. This ordinance was repealed by an ordinance passed April 4, 1884, entitled “An Ordinance adjusting differences between the Town of Lake and the Chicago and W. I. R. R. Co., repealing an ordinance of September 8, 1880, and amending and re-enacting Section 2 of an ordinance passed November 7, 1879.

“It being intended to grant the company the use of so much of said streets lengthwise between Auburn and 49th streets as is necessary to lay and maintain one or more tracks; also the use of the alleys between 43d street and 46th street lengthwise for railroad purposes, when the company owns the lots on both sides of the same or when there is a street on the other side. Forty-seventh street to be crossed within a distance of 267 feet of the west line of Stewart avenue.

PROVIDED, the main tracks shall not be laid in Wallace street and the streets running north and south, west of where the present west track *now* lies at any point where the company does not own the frontage on said streets or has not the consent of the owner or owners thereof.”

8. Ordinance granting right of way to C. & W. I. R. R., passed by City Council of Chicago, September 15, 1879.

“From 39th street at some point within 100 feet west of the west line of Stewart avenue, north parallel with said avenue to Grove street and Stewart avenue; thence over property said company may acquire to a

terminus between the east branch of the Chicago River and the west side of State street and between 16th street and the south line of Van Buren street.

The company to permit any person or corporation, duly authorized by ordinance of the city, to construct and use side or switch tracks in connection with its main tracks."

9. Ordinance construing the ordinance of September 15, 1879, granting rights to the C. & W. I. R. R. Co., and granting other and further rights, passed August 6, 1883.

The city abandons opening of Dearborn street from Polk to Taylor street and sells to R. R. Co. school property on 3d avenue near 12th street for \$90,000.

The railroad company shall not lay down any track or tracks north of the south line of Polk street or between Polk and 12th street, east of the west line of 3d avenue or west of the east line of Clark street.

Permission granted to use for railroad and depot purposes, the following streets and alleys:

Those portions of Third avenue and Fourth avenue in Walker, Shelby and Greer's subdivision of the Uhlich tract in the East fraction of the Northeast quarter of S. 21, T. 39, N. R. 14, and also the alley running north and south between Third avenue and State street from 14th street to near 12th street; thence running west to Third avenue; also the alley running north and south between Taylor and Polk streets, between Third and Fourth avenue whenever and wherever the company owns the land on both sides thereof and the reversionary interests of any such owners.

The city's interest to cease and all of such streets and alleys thereupon to become vacated and pass to said railroad company.

Permission granted to lay down one track on the east side of Fourth avenue from 14th to 12th street, the west rail to be not more than $9\frac{1}{2}$ feet from the east side of Fourth avenue.

The ordinance of September 15, 1879, ratified and the acts of company under the same otherwise confirmed.

10. Ordinance, granting right of way to C. & W. I. R. R. Co. (Belt) from Wallace street on the north line of 75th

street, thence west on the north line of 75th street where said streets exist and on the north side of the right of way of the Chicago and Strawn Ry. Co. (Wabash) to a point where it intersects with the right of way of the Chicago and Grand Trunk Ry. Co., passed by trustees of the Town of Lake, July 5, 1881.

11. Ordinance granting permission to C. & W. I. R. R. Co. (Belt) to lay down two or more tracks from the terminus described in the ordinance of July 5, 1881, at the crossing of the Chicago & Grand Trunk Ry. Co., thence westerly to a point on the dividing line between the West half and the East half of the Northwest quarter of S. 27, T. 38 N., R. 13, thence in said dividing line to the north line of said Town of Lake, passed by the board of Trustees November 1, 1881.

12. Ordinance granting permission to lay down and operate the necessary tracks required in the prosecution of its business south of 47th street and north of 55th street and between Wallace street and the west side of Wright street, with the privilege of using lengthwise any of the intervening streets and alleys.

The same authority being granted to said R. R. Co. and the C. & W. Ind. Belt Ry. Co., jointly and severally in the territory bounded on the south by the south line of the Town of Lake (87th street), on the west by Wallace street as laid down in the plat of Sission and Newman's Subdivision of South Englewood, till it reaches, if extended, the north side of Vincennes avenue and from thence north to the center line of Wallace street at 81st street, on the east by the east line of the Seymour estate subdivision of the W. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of S. 33, T. 38 N., R. 14, to the northeast corner of said W. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ and from that point west to the northwest corner thereof; thence northwesterly to the northeast corner of Lot 5 in Sutherland's Subdivision of part of the N. W. $\frac{1}{4}$ of said S. 33 and continued to an intersection of the main line of said R. R. Co.

The streets and alleys south of Vincennes avenue whenever the company shall acquire all the land abutting thereon may be vacated to that extent for use by said R. R. Co.

Before what is known as Holland settlement road shall be

appropriated by the company, it shall be put in good condition for travel, 87th street, where Holland road intersects it west to Wallace street, and Wallace street from said intersection to Vincennes avenue.

The company shall also set apart and reserve a strip of land 33 feet wide on the east side of the land acquired by it between 49th and 51st street for drainage and highway purposes, except where such east side abuts upon a public street. Passed by board of trustees November 1, 1881.

13. Ordinance granting permission to C. & W. I. R. R. Co., to lay down side track on Wallace street between 58th street and 59th street, to connect with manufacturing establishment of H. W. Forbes, passed November 11, 1881. (Lake.)

14. Ordinance granting permission to C. & W. I. R. R. Co. to lay down one additional track east of its main line and connecting with its main track not exceeding 90 feet and not less than 80 feet from the north line of 63d street, passed December 16, 1881. (Lake.)

15. Ordinance granting permission to C. & W. I. R. R. Co. to lay down and operate one switch track from its main line at or near the west line of 59th street, running in a northwesterly direction to the west side of Wallace street upon land outside of said street till it reaches the side track heretofore authorized, about 300 feet north of 59th street, passed January 6, 1882. (Lake.)

16. Ordinance granting permission to C. & W. I. R. R. Co. (Belt) to lay down and operate two or more tracks over and upon the street known as 46th street (avenue) commencing at or near the center of the west half of S. 34, T. 30 N., R. 13, on the south line of said town, thence running north to the north line of said town, passed by board of trustees of Town of Cicero, November 26, 1881.

17. Ordinance providing for depression of tracks under South Clark street and L. S. & M. S. Ry., C. R. I. & P. Ry., and St. Charles Air Line, passed by city council, May 17, 1897. (C. P., pp. 209-223, 1897-8.)

18. Track Elevation Ordinance, October 23, 1899, for elevating tracks of C. & W. I. R. R. from 22d street to 70th

street. (C. P., 1889-1900, pp. 1394-1429.) This contains the following provision:

“Any and all portions of any streets, alleys or avenues *extending into or across* any of said lines of railway within the limits hereinbefore provided for the elevation of said roadbeds, or any of them, except the streets and avenues enumerated above in Section 4 and in which subways are required to be constructed, shall be and the same are hereby discontinued and vacated *under the elevated* roadbeds and tracks in this ordinance described and within the limits of the right of way of any of said railroad companies; and the City of Chicago shall, at any time, take any proceedings essential to perfect or effectuate such vacation.” (Section 9 of Ordinance.)

The foregoing are all the ordinances that I have been able to find whereby the right of said company to the use of streets and alleys along its right of way may be established.

It will be seen that quite a number of them set out in the report are used by the company by virtue of ordinances and their occupancy cannot, therefore, be classed as an encroachment upon public rights.

However, from the thorough investigation made by the Map Department, whose report is herewith transmitted, I am of the opinion that the company, as well as others adjacent to its right of way, are now either in full possession of public streets and alleys without right, or they are preparing to take such possession without even color of right.

These conditions are shown on the maps of the city and have been verified by personal inspection.

While your committee should protect as far as it can, the long continued occupancy by railroad companies and others, under color of right, of parts of streets and alleys, I believe that there is ample justification for a thorough investigation of this matter in every part of the city.

Very truly yours,

NICHOLAS MICHELS,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JULY 13, 1912.

HON. JAMES DONOHUE, Chairman, Committee on Judiciary,
State Legislation, Election and Rules.

Dear Sir:

In compliance with the direction of your committee, we advise you concerning an ordinance, a copy of which is hereto attached, as follows:

We are of the opinion that said ordinance is invalid for two reasons:

1. It vests in a committee of the council arbitrary power to permit one person to violate an ordinance and to deny to another person the right to violate the ordinance under identical circumstances.

In speaking relative to this subject in *Cicero Lumber Company v. Town of Cicero*, 176 Ill. 9, the court at page 26 says:

“But the other ground, upon which the ordinance of May 23, 1896, is attacked as invalid, is of a more serious character. By the ordinance of May 23, 1896, all persons are forbidden to take any omnibus or heavy vehicle or any traffic vehicle upon either of the boulevards therein named, except private wagons conveying families, ‘or upon special permission of this board.’ The meaning of this provision is, that all traffic vehicles, except private wagons conveying families, are only forbidden the use of the boulevards in case their owners do not obtain the special permission of the board of trustees. In other words, the discretion is lodged with the board of trustees to permit or not to permit traffic vehicles to be used upon the boulevards in question. The ordinance, in so far as it invests the board of trustees with the discretion here indicated, is unreasonable. It prohibits that which is, in itself and as a general thing, perfectly lawful, and leaves the power of permitting or forbidding the use of traffic teams upon the boulevards to an unregulated official discretion, when the whole matter should be regulated by permanent local provisions operating generally and impartially. The ordinance is not general in its operation. It does not affect all citizens alike, who use traffic vehicles. It is only persons driving traffic vehicles upon the boulevards without the permission of the board of trustees, who are subjected to the penalties of the ordinance. The ordinance in no way regulates or

controls the discretion vested thereby in the board. It prescribes no conditions, upon which the special permission of the board is to be granted. Thus, the board is clothed with the right to grant the privilege to some, and to deny it to others. Ordinances which thus invest a city council or a board of trustees with a discretion which is purely arbitrary, and which may be exercised in the interest of a favored few, are unreasonable and invalid. The ordinance should have established a rule by which its impartial enforcement could be secured."

It will thus be seen that the Supreme Court of this state has held that an ordinance of the nature of that under consideration vests an arbitrary discretion, and that, therefore, the ordinance is unreasonable and void.

The ordinance would be otherwise, if it enumerated certain circumstances under which a special permit might be issued upon the recommendation of two-thirds of the committee to all persons bringing themselves within the prescribed conditions and applying therefor.

An ordinance specifying certain conditions and leaving it to a certain person or set of persons to determine the existence of the prescribed conditions, does not vest an arbitrary discretion in such person or persons, but simply leaves it to such person or persons to determine the existence or non-existence of the conditions specified.

An ordinance of this nature was before the court and held valid in *Block v. City*, 239 Ill. 251.

2. We are further of the opinion that any attempt to exercise the police power by anything other than a general ordinance is nugatory.

People v. Union Telegraph Co., 232 Ill. 260.

And any attempt to modify an ordinance by an order is ineffective inasmuch as an ordinance can only be amended, modified or repealed by action of equal dignity therewith. We are, therefore, of the opinion that the ordinance in question is invalid.

With reference to the request that we submit to your committee an ordinance, which we believe to be valid, we beg to advise you that we cannot comply with such request without first knowing such conditions as your committee

might desire to have embodied in an ordinance as the foundation for the issuance of a special permit. In other words, in order that an ordinance of the nature desired may be valid, it is, in our opinion, necessary that it specify conditions or facts which the committee must find to exist as a condition precedent to the issuance of such a special permit, and the ordinance should then provide that the committee must issue such special permit to all persons bringing themselves within the conditions prescribed.

Yours respectfully,
 CHARLES M. HAFT,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JULY 15, 1912.

HON. RAY PALMER, City Electrician.

Dear Sir:

Under date of July 12th, you ask this department whether you have the authority to install electric lights in Woodlawn, Groveland and Aldine Parks under the council order passed July 8th. We assume by this that you mean to ask whether you should comply with said council order.

Under date of July 12th we rendered you an opinion relative to this matter holding that inasmuch as Groveland Park was not accessible by the public, that the public was excluded and in no way enjoyed and shared the use of the grounds and that the use of the park was devoted entirely to the owners of the lots fronting or bounding said park, and that the same being dedicated as a private park the City of Chicago was not obliged to light it at its expense.

Since writing this last opinion, you inform us in your communication of July 12th that the city council passed the following order:

“ORDERED, that the city electrician be and is hereby ordered to replace with electric lamps the present gas lamps now located on the walk immediately in front of the residences adjoining Groveland, Woodland and Aldine Square.”

As we understand it, you have been installing a new system of electric lighting in the district in which Groveland Park is situated and are doing this under an order passed by the City Council on October 3, 1910, which authorized you to enter into a contract with the Sanitary District of Chicago. This contract was entered into between the City of Chicago and the Sanitary District, as we are informed, on October 27, 1910, pursuant to said order.

Among other things appearing in said contract, appears the following:

“Whereas, said city is desirous that its electrical system and equipment shall be extended to such a capacity that *additional streets, alleys and other public places* of the city may be lighted and that the supply of electrical energy available for its general and municipal purposes may be increased * * *

It is expressly understood and agreed by and between the parties hereto that said city shall pay monthly to said district at the rate of \$15.00 per horse power per year, or \$1.25 per horse power a month for all electrical energy delivered to said city. * * *”

We must hold that under this contract provided for by the city council, as aforesaid, only public streets, public alleys and public places come within the operation of such contract.

We doubt very much that the council order as passed is valid. There is no authority anywhere permitting you to supply private parks with electric current or with furnishing them electric arc lamps or lights. In the absence of such authorization and in the absence of an appropriation for such purpose, assuming an appropriation for such purpose to be valid, we believe that you are without authority to light Groveland Park or any other private park.

It was held in *Washingtonian Home v. Chicago*, 157 Ill. 428:

“The revenues of the City of Chicago arising from licenses, from taxation, and from all other sources, are owned by the city and held by it in trust, to be used for corporate purposes which are lawful, and the revenues of a city cannot be diverted to any other purpose. The revenues of a city cannot be donated by the officers of the city, or by the city council, to any person they may think entitled to the same, but, on the other hand,

such revenues can only be paid out or appropriated by the city council or its officers in the manner and for the purposes authorized by law."

Yours very truly,
 HENRY A. BERGER,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JULY 15, 1912.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

The writer was informed that it was proposed to call for alternative bids for a new garbage contract extending over a period of five or ten years, or possibly even a longer time, and took the liberty of calling your attention to the fact that the statute provided for a term of not less than one year nor more than five years. Thereupon you asked to be advised as to whether it would be lawful for the city to enter into a contract for a longer period than five years.

At the time you asked for this opinion you stated that it would be very much to the advantage of the city if authority could be found under which a longer contract could be let. Having this in mind we have searched the authorities most diligently to see whether the statutes could be construed in such a way. We are, however, unable to point to any section of the statute or any decision of the courts which warrants such a construction.

Under the general incorporation act the city can enter into a contract only after an appropriation has been made. There are some exceptions to this rule, but it is not necessary to discuss them, because they do not affect the question we are considering. The statute must be read as conferring power to make a valid contract for the current year only, unless express authority is found in some other place or by some other means.

It is true that a large number of our contracts are framed so that the contractor gives the city the option of

continuing to use supplies and materials for some time after the current fiscal year, but it is doubtful whether the city would be in a position to enforce such a contract beyond the current fiscal year, if the contractor declined to furnish such materials and supplies after the beginning of the new year.

The most that can be said of such an agreement is that if the city avails itself of the privilege of taking additional supplies and materials and gets the benefit of same, it will be held liable for the payment therefor.

East St. Louis v. G. L. & C. Co., 98 Ill. 415;

Hay v. City of Springfield, 64 Ill. App. 682;

Keith v. DuQuoin, 89 Ill. App. 40;

Carlyle W. L. & P. Co. v. City of Carlyle, 31 Ill. App. 325.

As stated above, there are certain exceptions to the general rule. There is provision made for the letting of a contract in case of an emergency, also for letting a contract for the supply of water for thirty years, and other exceptions may be pointed out, among which is the exception under which you are now about to proceed.

The Legislature in the year 1897 provided for the making of contracts relating to the collection and final disposition of garbage and ashes "for more than one year and not exceeding five years." It also made special provision to the effect that it became the duty of the city council when such contract was made to include in the annual appropriation a sufficient amount to pay for the expense incurred under same for the current fiscal year.

It was held in *City of Chicago v. McDonald*, 176 Ill. 410, that such a contract created a debt on the part of the city and was subject to all the limitations imposed by the constitution and by statute when a liability is created, notwithstanding the fact that an appropriation was to be made only from year to year as the indebtedness accrued under such a contract.

It will thus be seen that the statute relating to garbage contracts extends the power of the city very materially, but does not authorize the making of a contract for any longer

period than five years, and any provision for an extension would unquestionably be void if inserted therein.

It is possible indeed that an ordinance requiring such alternative bids as proposed, or specifications drawn up in that way and advertised, might result in the validity of a five-year contract being successfully attacked.

This department, therefore, advises against any steps being taken towards securing bids for any longer period than five years.

Yours respectfully,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JULY 15, 1912.

HON. WILLIAM F. RYAN, Chairman, Committee on License.

Dear Sir:

At the meeting of the Committee on License held July 8th, two proposed ordinances—one amending Section 1525 and the other amending Section 1561 of The Chicago Code of 1911—were referred to the Corporation Counsel for an opinion “as to the effect of said ordinances if passed, and whether the enforcement of the ordinance amending Section 1525 of the Code would require the keepers of dram shops to take out a government wholesale liquor license.”

Section 1525 of the Code defines a dram shop, requires a license therefor and prohibits the issuance of a license to keep a dram shop in certain specified places.

The definition of a dram shop given in said Section 1525 is as follows:

“Every place where spirituous, malt, vinous or intoxicating liquor of any kind whatsoever is sold, given away or otherwise disposed of in quantities of less than one gallon, and whether consumed or to be consumed upon the premises or not, and whether sold, given away or disposed of in any grocery store, department store, liquor store or other place whatever, shall be deemed and is hereby defined to be a dram shop. * * *”

The sole change made in the existing sections by the proposed amendments is the substitution of the word "five" for the word "one" preceding the word "gallon" in each of the sections mentioned.

The effect of the proposed amendment of Section 1525 is to change the definition of a dramshop from a place where liquor is sold, etc., in quantities of less than *one* gallon (as Section 1525 now provides) to a place where liquor is sold in quantities of less than *five* gallons. In other words, if the proposed amendatory ordinance is passed, liquor may be sold under a dram shop license in any quantity less than *five* gallons, instead of any quantities of less than *one* gallon, as the present ordinance provides.

A dram shop is defined in Section 1 of Chapter 43 of the Revised Statutes of Illinois as follows:

"That a dram shop is a place where spirituous or vinous or malt liquors are retailed by less quantity than one gallon. * * *"

By Clause 46 of Section 1 of Article V of Chapter 24 of the Revised Statutes of Illinois, express power is conferred upon the City of Chicago to license, regulate and prohibit the sale or giving away of intoxicating liquors, etc.

The statutory definition of a dram shop is not exclusive, but under the above mentioned express power conferred upon cities, a city may, for the purpose of licensing and regulating the liquor traffic within its borders, classify the traffic as between dram shops and wholesale dealers as it may see fit.

Straus v. City of Galesburg, 203 Ill. 234.

We are of the opinion that the proposed ordinance amending Section 1525 of the Code would be a valid ordinance.

The effect of the proposed ordinance amending Section 1561 of the Code would be to make a wholesale liquor dealer one who sells spirituous liquors in quantities of *five* gallons or more instead of in quantities of one *gallon* or more, as now provided by Section 1561. This change would be necessary if the ordinance changing the definition of a dram shop is passed. Under the proposed amendment of Section 1525, all places where liquor should be sold in quantities of less than *five* gallons would be dram shops. Therefore, the classifica-

tion of wholesale liquor dealers should be changed to persons selling liquors in quantities of *five* gallons or more.

In order to make Chapter XLII of the code, entitled "Liquor," consistent throughout, the words "five gallons" should be substituted for the words "one gallon" where the latter words now appear in Sections 1530, 1539, 1540, 1553, 1554, 1562, 1563, 1567 and 1569, and the word "one" in the third line of Section 1555 should be changed to "five."

Under the existing ordinance the license fee for wholesale malt liquor dealers selling malt liquors in quantities of not less than one, nor more than six gallons at a time, is at the rate of fifty dollars per annum (Art. IV, Chap. XLII, of the Code); wholesale spirituous liquor dealers selling or offering to sell any spirituous liquors in quantities of one gallon or more at a time are required to pay an annual license fee of one hundred dollars (Art. V, Chap. XLII of the Code), and wholesale vinous liquor dealers selling or offering for sale any vinous liquors in quantities of one gallon or more at a time are required to pay an annual license fee of fifty dollars. (Art. VI, Chap. XLII, of the Code.)

If the proposed amendatory ordinances are passed all of the above mentioned dealers now classified as wholesalers, who continue to sell in quantities of one gallon or more up to any quantity less than five gallons, will come within the proposed new classification as dram shop keepers and will be required to pay the dram shop license fee of \$500.00 for each of the two saloon license year periods, that is, from May 1st to October 31st, and from November 1st to April 30th.

The proposed amendments will not affect the question of the requirements on the dram shop keepers in respect to the United States government wholesale liquor license. The government licenses are not in any way controlled or affected by the provisions of or privileges conferred by the licenses issued by the city, but are on an entirely independent basis.

I transmit herewith the two above mentioned proposed

ordinances amending Sections 1525 and 1561 respectively, of the Code.

Yours respectfully,

BRYAN Y. CRAIG,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JULY 15, 1912.

HON. JOHN E. TRAEGER, Comptroller, City of Chicago.

Dear Sir:

Your letter of July 12, 1912, addressed to the Corporation Counsel, in which you ask for an opinion as to whether in refunding a deposit made by a certain contractor, Thomas Burke, in the case of special assessment warrant No. 34406, you can add accrued interest to said refund, has been referred to me.

Section 84 of the Local Improvement Act has the following provision:

“Within thirty (30) days after the final completion and acceptance of the work, as hereinbefore provided, the board of local improvements shall cause the cost thereof to be certified in writing to the court in which said assessment was confirmed, together with an amount estimated by the board to be required to pay the accruing interest on bonds or vouchers issued to anticipate collection and thereupon, if the total amount assessed for said improvement upon the public and private property exceeds the cost of the same, all of said excess, excepting the amount required to pay such interest as herein provided for, shall be abated and the judgment reduced proportionately to the public and private property owners and shall be credited pro rata upon the respective assessments for said improvements under direction of the court, and, in case the assessment is collectible in installments, such reduction shall be made so that all installments shall be equal in amount, except that all fractional amounts shall be added to the first installment so as to leave the remaining installments in the aggregate equal in amount and each a multiple of one hundred dollars (\$100.00).”

In reliance upon this provision of the statute it had been

the custom of the Board of Local Improvements prior to 1910 in levying for special assessments to add 10 per cent. for deficiencies in interest. This 10 per cent. reserve was intended to provide for those cases when assessments were paid up by the property owners and thus the interest which the property owners otherwise would have paid was stopped and yet the bonds issued to anticipate the collection of the warrants were still outstanding and were still bearing interest. This reserve was not in any way intended to cover defects in the contractor's work or to act as a guarantee for the faithful performance of the work done by the contractor. It was a reserve which the property owners were compelled to pay, not for their benefit but for the benefit of the contractors and the bondholders in order that the contractors and bondholders might all be paid in full, both principal and accrued interest.

In case this reserve was found to be too much the surplus, according to the provisions of said Section 84, was rebated back to the property owners by whom the reserve had been paid in the first instance. Since 1910 it has been found that a 10 per cent. reserve to provide for deficiencies in interest is unnecessarily large so that the reserve has been cut down to 5 per cent.

In the case in question it seems that the 10 per cent. reserve was not provided for and therefore the contractor, Thomas Burke, was compelled to deposit the sum of \$850.29 in order to make up the shortage. In other words, he put up a sum of money which according to law (said Section 84) it was the duty of the property owners to pay. There was no warrant in law for compelling the contractor to put up this sum of money.

Section 91 of the Local Improvement Act makes the following provision in regard to the payment to contractors:

"From time to time, as the work under any contract for such improvement progresses, upon certificates by the said board of local improvements, or by some officer designated by such board for that purpose, payments may be made either in money, vouchers or bonds, as herein provided, to apply upon said contract price, reserving, however, a sufficient amount upon each of said payments to properly secure, in the judgment of said board, the

faithful performance of the said contract, said reserve to be paid over at such time and on such conditions as the board shall fix, after the said work has been completed or accepted.”

Under said Section 91 it is proper to reserve a sufficient sum of money from the amount due to the contractor to secure the faithful performance of his work. This reserve, however, is to act as guarantee for the faithful performance of the contract. It is not intended to provide for deficiencies in interest. In other words, it was not intended that the contractor should be under any obligation to provide for the deficiencies in interest.

It has, however, been the custom for the Board of Local Improvements when it seemed that there was not sufficient money in the special assessment fund to pay the contractor in full to make the contractor sign an agreement, as follows:

“In connection with bid for
Warrant No. , being the lowest bidder, and the amount of said bid, plus the usual 5 per cent. reserve for possible deficiency in interest, being in excess of the assessment, hereby agree, in consideration of the contract being awarded to , to accept a voucher drawn against the last installment for an amount sufficient to cover the shortage in said interest reserve, said voucher to bear the following endorsement:

This voucher will become an obligation of Special Assessment Warrant No. only when all other vouchers, bonds or interest coupons issued or to be issued on account of this improvement have been called and paid in full.

The voucher above mentioned which was not to be paid only all other vouchers, bonds or interest coupons had been called and paid in full, always bore interest. In other words, as long as there has been money in the special assessment fund with which to pay interest, it has never been the custom to allow the contractor to suffer for the non-payment of interest.

The question as to whether the city is legally liable to pay interest in this case is best determined from the holding of the court in the case of *Conway v. City of Chicago*, 237 Ill. 128 (page 137):

“The general rule as to the liability of municipalities is, that they are not liable on their contracts for interest in the absence of an express agreement to pay it, yet, where money is wrongfully obtained, or where it is lawfully obtained and unlawfully and wrongfully withheld, municipalities are liable for interest to the same extent as a private person.”

While, in the case in question, it is uncertain from the language of the letter of March 4, 1910, addressed to Mr. Thomas Burke by the deputy comptroller, whether the city has made an express agreement to pay interest, that question seems immaterial for the reason that in compelling Thomas Burke to put up the sum of \$850.29 the city, in my opinion, was not acting under warrant of law but was practically compelling the contractor to put up money which it had no right to compel him to deposit. In keeping this deposit during the last five (5) years, the city has practically been wrongfully withholding from Thomas Burke the money which was due him. Therefore, under the law as laid down in the Conway case above, it is my opinion that the city is liable for interest on this deposit of \$850.29 at the rate of 5 per cent. per annum.

It is possible that the statement of the comptroller—

“We are of the opinion that interest should be paid on this deposit up to the time that same is refunded to you and from the date of the said deposit at the rate of 5 per cent. per annum, provided there are funds in hand to the credit of this account applicable to the refunding of your deposit when all the other claims of the account have been discharged and, further provided that the funds are sufficient to pay your claim and interest in full,”

may be construed as an express agreement by the city to pay interest, but as the effect of this language is somewhat doubtful I have rested the reason for this opinion on another ground, namely, that the money has been wrongfully withheld by the city.

There is a final reason why I believe that the city is safe in paying interest upon this deposit. If the interest were not paid said interest which is now in the special assessment fund would be rebated back to the property owners. The property owners, however, never put up this reserve as is customarily

the case according to Section 84 of the Local Improvement Act and therefore they could not be heard to complain if money which was never put up by them, as the law provides, but which was put up by a contractor upon whom no such duty rested they, then, cannot be heard to complain if the interest on that money is refunded to the person who originally put up the deposit.

Respectfully submitted,
 HOWARD F. BISHOP,
*Asst. Attorney, Board of
 Local Improvements.*

Approved:

PHILIP J. McMANUS,
*Attorney for the Board of Local
 Improvements.*

Approved:

WM. H. SEXTON,
Corporation Counsel.

JULY 16, 1912.

DR. G. B. YOUNG, Commissioner of Health.

Dear Sir:

Your letter with reference to the location of an undertaking establishment on Michigan avenue between 18th and 20th streets and the necessity for frontage consents was referred to the writer for an opinion.

Section 1238 of the Chicago Code of 1911 provides that such a business cannot be established "on any street in any block in which two-thirds of the buildings on both sides of the street are used exclusively for residence purposes, without the written consent of a majority of the property owners" on both sides thereof.

It seems that in the present instance 165 feet of this frontage is occupied by the Calumet Club, which you describe as bachelors' residential apartments, 25 feet is occupied by the Alvarado Hotel, and 100 feet is used as a boarding house, and you ask to be advised if any one or all of said properties should be considered as being used exclusively for residential purposes in determining whether or not the block is to be

regarded as a residential block within the meaning of the section above quoted.

This frontage consent requirement, as well as practically all others which appear in the Code, must be given a reasonable interpretation. It was probably not the intention of the city council to require too literal a construction of such a provision, yet at the same time the very fact that the word "exclusively" is used indicates that when a building is to be classed as a residence it should come strictly within the legal definition of the same.

Therefore on the one hand, it would not do to hold that a place like a doctor's residence or the residence of a dress-maker should be regarded as anything else but a building used exclusively for residence purposes merely because there happens to be a sign in the window and the occupant transacts some business in the house.

On the other hand a place of business or an institution is not to be regarded as a building used exclusively for residence purposes by reason of the fact that persons live there. Otherwise if carried to the last extreme it might be said that even an asylum was a place used exclusively for residence purposes.

In the present instance there is no difficulty whatever in determining that a club building is not used exclusively for residence purposes, in spite of the fact that there are apartments there rented out to bachelors. It has been held that a club which sells liquor to its members must take out a dram shop license. It can hardly be said, therefore, that a building devoted to club purposes is used exclusively for residence purposes. This would be true even if there were no liquor sold in the club.

So far as the hotel is concerned, we find that a hotel is distinguished from a boarding house in that it is kept for the entertainment of travelers and casual guests, while a boarding house is kept principally for the residence of permanent boarders.

Martin v. State Ins. Co., 44 N. J. Law 485.

In re Liquor Licenses, 4 Montg. Co. Rep. (Pa.) 77.

A hotel is usually a place of general entertainment as well

as a boarding place. Whether that is true in the present instance or not, it seems that it is a public house and comes within the definition of a hotel as a place of business.

We, therefore, do not regard the hotel in question as a building used exclusively for residence purposes.

In the case of the boarding house a more difficult question is presented. If it were a small place where only a few persons were boarding practically on the basis of a family, there would be no question about it, since such a place has been repeatedly held to be a "dwelling house" for all purposes.

State v. Leedy, 95 Mo. 76.

In re Veeder, 65 N. Y. Supp. 517.

Birmingham W. Co. v. Truss, 135 Ala. 530.

So large a place as the one in question, which seems to occupy a frontage of 100 feet, may be regarded as doubtful.

It was held in *Cady v. McDowell* (N. Y.), 1 Lans. 484, that a boarding house of this kind is a quasi-public house where boarders are generally and habitually kept and which is held out and known as a place of entertainment of that kind, and such a place was distinguished from a place of the character mentioned above where a private housekeeper entertains a few boarders for hire.

We are disposed, however, to view the boarding house you mention as coming within the definition of a building used exclusively for residence purposes, notwithstanding the fact that it is a large place. We are inclined to the view that was expressed in *Cucannon* (Pa.), 3 Brewst. 344, where it was held that a boarding house is for the accommodation of those who are accepted as guests by the proprietor, and is as much a private house as if there were no boarders. The reasoning used in that case was to the effect that a house is private although the head of the family boards his son and other relatives, and does not change its character of a private house merely by receiving strangers within the same.

While, therefore, there is some doubt even as to the boarding house, we would advise you to classify that as a building used exclusively for residence purposes, but would regard the other two places as not within such classification.

We return herewith the plat submitted to us in connection with this matter.

Yours very respectfully,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JULY 17, 1912.

HON. EDWARD COHEN, City Collector.

Dear Sir:

In a letter of recent date you asked to be advised as to the propriety of charging separate license fees for each table used in what is known as a Japanese Bowling Game in Riverview Park, and you state that the same question is applicable to the African Dip.

Attached to your letter are three communications from parties interested relating to this subject-matter.

It seems from your letter and the other correspondence submitted that the parties who run the Japanese Bowling Game have three distinct places of amusement located within Riverview Park. Two of them run twelve tables or alleys each and one of them has ten. These tables or alleys measure seven feet six inches in length by eighteen inches wide.

There is of course no question about the license fee to be charged for each separate place of amusement where these tables are operated. The only doubt comes in on the city's right to charge for each separate table. On this point we are convinced that the ordinances do not contemplate the exaction of separate license fees.

In looking over the list of fees to be charged for amusement licenses, we find that in the fourth class, consisting of exhibitions furnished through automatic devices, which are frequently operated in groups, no provision is made for a license fee for each separate device. The same may be said of some other of the various classes into which amusement enterprises are divided.

In fact the only class in which the ordinance positively

states that a separate license fee should be collected for each of the devices is the eighteenth class.

Such being the case, it does not seem reasonable to assume that it was intended by the city council that a separate license fee should be exacted for each device operated in the same place and under one management in amusements of the seventeenth class.

Small swings operated by human power are included in this classification. If small swings had not been included in this classification it might have been said that the city council had not contemplated the possibility of there being more than one device in each place, but this cannot be said of small swings, which are usually operated in groups.

This leads us to the conclusion that it was not intended that there should be more than one license fee required for each place of amusement operating the kind of devices included in the seventeenth class.

The same reason applies in the case of the African Dip game, where it seems there are two or three targets and dips at each place of amusement.

We have passed on this question on the assumption that the games in question are games of skill.

In case these games do not come within that classification, then, of course, they would fall within the twenty-first class, as entertainments which are not included in any of the twenty classes of amusements which are specifically defined; but whether these entertainments are games of skill or otherwise the rule as to the number of license fees applies in either event.

We return herewith the three communications above referred to.

Yours respectfully,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JULY 17, 1912.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

May 14 and 16, 1912, John G. Drennan of the Illinois Central Railroad Company, and E. T. Glennan of the New York, Chicago & St. Louis Railroad Company (Nickel Plate Railroad), respectively, addressed communications to you—

(a) Protesting against the action of the Commissioner of Public Works in refusing the application of the Illinois Central Railroad Company, made April 5, 1912, for a permit to construct the subway at 79th street, the plan of the subway not being in accordance with the ordinance of February 19, 1912.

(b) Denying that the companies' failure to complete the work by December 31, 1911 (the date specified in the amendatory ordinance of December 19, 1910) abrogated the terms and conditions of the ordinance or prevented the companies from completing the work after December 31, 1911, basing their contention on the proposition that by the terms of the ordinance the city could not declare a forfeiture but could only finish the work itself.

(c) Contending that the ordinance of June 28, 1909, is still in full force and effect; and

(d) Contending that the ordinances of January 2, 1912, and February 19, 1912, whether considered as amendatory or mandatory ordinances, are void.

In considering the subject-matter, we will not attempt to re-state the history of the track elevation work at Grand Crossing nor the details of the contentions by the companies in said letters, but will confine ourselves to the matters as above stated.

You referred the communications to this department, and an exhaustive opinion was prepared by us. After this opinion was completed we learned for the first time that the Nickel Plate Railroad claimed that by reason of its being delayed in the performance of its work by the city and the Illinois Central Railroad Company, it was entitled to an automatic extension of time within which to complete this work beyond December 31, 1911, by virtue of Sections 14 and 15 of the ordinance of June 28, 1909.

These claims of delay are contained in Mr. Glennon's letter to you of July 10, 1912, which you sent to this office on the 12th instant, requesting an early statement with reference to the matter.

These claims are in substance as follows:

1. "The time for completion by the Nickel Plate Railroad of the work required to be done by it under the terms of the ordinance of June 28, 1909, has not expired but has been automatically extended under the provisions of Section 14 of that ordinance by the failure of the City of Chicago to perform the duties imposed upon it by said ordinance."

2. "The time for the completion by the Nickel Plate of the work required to be done by it under the terms of the ordinance of June 28, 1909, has been further automatically extended under the provisions of Section 15 of that ordinance by the delay caused by the refusal of the Illinois Central Railroad Company to abide by the arbitration award in relation to the construction of the work required by the ordinance of June 28, 1909, and the apportionment of the cost thereof since the Nickel Plate was both physically and contractually dependent upon the co-operation of the Illinois Central in the construction of its elevation and crossing of the Illinois Central at 79th street."

At page 3 of said letter the company elaborates its claim on item 1, and at page 8 its claim on item 2, the latter being a history of the relations of the companies with each other in bringing about the separation of grades, and the arbitration to decide the distribution of cost.

The sections of the ordinance of June 28, 1909, relied upon by the company to extend its time in case of delay are as follows:

"Section 14. The railway and railroad companies mentioned in this ordinance, which are required to elevate their roadbeds and tracks, shall begin the active operations necessary in carrying out the provisions of this ordinance on or before the first day of August, A. D. 1909, and shall have so prosecuted said work that, on or before the thirty-first day of December, A. D. 1909, the subways provided for in this ordinance will be ready for the use of pedestrians and team traffic and shall fully

and finally complete the work of elevation on or before the thirty-first day of December, A. D. 1910, unless prevented by strikes or riots, or restrained by injunction or other order or process of a court of competent jurisdiction. The time during which the said railway and railroad companies shall be prevented by strike or strikes, riot or riots, or legal proceedings as aforesaid, shall be added to the time hereby limited for the completion of said work; provided said railway and railroad company, or companies, give notice to the Corporation Counsel of the City of Chicago of the institution of said legal proceedings. The City of Chicago shall thereupon have the right to intervene in any suit or proceedings brought by any person or persons seeking to enjoin or restrain or in any manner interfere with the prosecution of said work and move for a dissolution of said injunction and restraining order and for any other proper order in such suit.

And it is further distinctly understood and agreed that if said railway and railroad companies, or either of them, shall be delayed in the prosecution of the said work required to be done under the provisions of this ordinance, by the reason of the obstruction of pipes, conduits, wires or other property of private corporations or individuals, as mentioned in Section 5 of this ordinance, or by reason of any delay on the part of the City of Chicago or any of its officers in performing the duties imposed upon the city and its officers by this ordinance, in respect to the work herein required to be done by said railway and railroad companies, respectively, then and in that case the time which said railway and railroad companies, or either of them, shall be so delayed shall be added to the time during which said companies are required by the terms of this ordinance to complete said work.

Section 15. Each and every company required by this ordinance to elevate its tracks shall do its portion of the work in accordance with the terms hereof in apt and proper time so as not to interfere with the proper and orderly prosecution of such work as a whole. Should any company fail or neglect so to prosecute its work, the Commissioner of Public Works of the City of Chicago shall have and is hereby given the right, power and authority to give ten (10) days' notice in writing to such delinquent company to prosecute its work. If such company shall fail or neglect to comply with said notice, the Commissioner of Public Works shall take charge of and

cause such work to be done and the expense thereof shall thereupon be paid by such delinquent company. Any time during which any of said companies may be prevented by delay of any other of said companies shall be added to the total time allowed to the company so delayed for the completion of its own work."

NOTE: December 10, 1910, the city council passed an ordinance amending said Section 14 so as to extend the time for completion of the work to December 31, 1911. (See C. Pro., 1910-1911, p. 3324.)

While it may be said that the ordinance of June 28, 1909, is a law (being an exercise of the police power by the city in requiring the removal of dangerous grade crossings) nevertheless, under the decision of our Supreme Court in *Chicago v. R. R. Co.*, 244 Ill. 220, it is also contractual in its nature, and having been accepted by the company, it became in a sense a contract.

The ordinance not only requires elevation of tracks and separation of the grades of the intersecting railroads, but also requires that the Nickel Plate Railroad shall acquire a new right of way by purchase or condemnation, maintain the pavement of its subway at 79th street, acquire and dedicate land for street purposes and divert and replace sewers.

If the company can sustain its claim for delay against the city based upon a legal obligation of the city to vacate any or all the portions of the public highways, designated in the letter of July 10, 1912, as well as the question of fact of such delay, or can sustain its claim of delay on the part of the Illinois Central Railroad Company, then it is not in default under the terms of the ordinance of June 28, 1909.

The question next presented is the effect of the ordinances of January 2, 1912, and February 19, 1912, on the ordinance of June 28, 1909, regardless of how the question of an extension of time may be decided because of the claimed delays the Nickel Plate Railroad Company has suffered.

While as has been stated the ordinance of June 28, 1909, is an exercise of the police power and is also contractual, after acceptance by the companies and the expenditure of large sums of money in part performance thereof, such an ordi-

nance can only be abrogated or modified through the exercise of the police power so as to require the expenditure of additional sums of money and the assumption of additional burdens when the paramount public necessities require it.

The questions presented, in our opinion, are matters of fact rather than of law and ought to be solved and determined by the city council or the Department of Public Works and Track Elevation in the following order:

First. Was the Nickel Plate Railroad delayed in the performance of its work by reason of any failure "of the city to perform the duties imposed upon it" by the ordinance of June 28, 1909, or by the "refusal of the Illinois Central Railroad Company to abide by the arbitration award in relation to the construction of the work" required by said ordinance?

If this question is determined in favor of the company, then the period of delay so found to have occurred should be added to the time for the completion of the work beyond December 31, 1911.

Second. Does the abolition of the 17-foot subway at 79th street prescribed by the ordinances of January 2, 1912, and February 19, 1912, place any substantial additional burden or expense upon the railroad company?

Third. If it does, is the abolition of such 17-foot depression, considering the engineering difficulties presented by the separation of the planes of the tracks of the railroad companies at Grand Crossing required in the elevation work, such "an overruling public necessity" as would justify placing on the railroad company the burden of additional expenditure in the construction of a subway of a different character at a place other than at 79th street or any other public highway?

The question of whether or not there has been a delay, and whether or not the period of completion has been automatically extended, may be determined without affecting the question of whether or not the ordinances of January 2, 1912, and February 19, 1912, are effective. If the time has been so extended, then the ordinances are effective only if it be determined that public necessity requires compelling the Nickel Plate Railroad Company to cross under the Illinois Central

at a point other than at 79th street, thereby avoiding a 17-foot subway in the public highway. If the time has been so extended and if the public necessities do not justify placing this additional burden upon the Nickel Plate Railroad Company, then the ordinances of January 2, 1912, and February 19, 1912, are invalid and not enforceable against the company.

If there has been no delay of the kind specified in Sections 14 and 15 of the ordinance, and therefore no so-called automatic extension of the time for completion, then the time of completion terminated December 31, 1911, and the ordinances of January 2, 1912, and February 19, 1912, are in full force and effect.

We return herewith said letters of May 14 and 16 and July 10, 1912.

Respectfully,
CHARLES M. HAFT,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JULY 17, 1912.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

In reply to your communication transmitting copy of letter from A. S. Baldwin, chief engineer, Illinois Central Railroad Company, with blue prints, and copy of your reply thereto, we beg to advise you that we have this day transmitted to the Mayor an opinion covering these questions. This opinion has been written in response to communications on behalf of the Illinois Central Railroad Company and the New York Central Lines to the Mayor, and we assume that the purport of this opinion will be brought to the attention of the two railroads in question by the Mayor.

Very truly yours,
CHARLES M. HAFT,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

SEPTEMBER 16, 1912.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

We invite your attention to a conference recently had in your office with the Nickel Plate and the Illinois Central representatives relative to track elevation at Seventy-ninth street, under the ordinance of June 28, 1909, and various ordinances amendatory thereof.

You will probably recall that it was agreed at that time that the Nickel Plate would prepare a bill to be filed in the Circuit Court of this state to restrain the enforcement of an ordinance requiring that the crossing of the Nickel Plate and Illinois Central tracks be made at a point other than Seventy-ninth street, and it was agreed on behalf of the city that it would expedite the hearing of that case.

The Nickel Plate prepared a bill for injunction, as was contemplated at that conference, and we prepared an answer thereto and arranged with Judge Carnes, a country judge, to hear the matter on the 1st of August. At a conference had with Messrs. Glennon and Carey in this office a day or so prior to the 1st of August, we objected to the embodiment in that bill of a claim on behalf of the complainant against the city for a considerable sum for damages on account of the failure of the city to issue a permit.

As you will probably recall, it was our understanding at the conference above referred to that the only question to be embodied in the bill was the right of the Nickel Plate to a permit under the ordinance of June 28, 1909. Messrs. Glennon and Carey were unwilling to eliminate the damage feature from the bill and we therefore advised them that we would not proceed with the trial at the time set so long as that feature remained in the bill.

The question also arose as to the waiver of an appeal in order that the decision of Judge Carnes might be a final settlement of the controversy between the city and the Nickel Plate. Messrs. Glennon and Carey were anxious that we waive the city's right to an appeal, but insisted on maintaining that right for the Nickel Plate. The result of our con-

ference with Messrs. Glennon and Carey was that the prosecution of the bill in the state court was dropped.

Since the abandonment of the bill for injunction, as above referred to, the Nickel Plate has prepared a bill quite similar to the one it had proposed to file in the Circuit Court, and has filed the bill so prepared in the District Court of the United States. This left us free to fight the bill as we saw fit and inasmuch as it is our opinion that, strictly speaking, the remedy of the Nickel Plate is by mandamus, and not by injunction, we have interposed a demurrer to its bill raising that point. It is probable that a hearing on that demurrer will be had within a short time.

Yours very truly,

CHAS. M. HAFT,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JULY 18, 1912.

HON. A. J. CERMAK, Chairman, Committee on Gas, Oil and Electric Light.

Dear Sir:

Complying with the committee's request of today for an opinion as to the right of the city council to forfeit the rights of the companies now owning or interested in the rights acquired by the Illinois Telephone and Telegraph Company under the ordinance of February 20, 1899, granted to said last named company, its assigns and lessees, and ordinances amendatory thereof, on the basis of the facts shown in the reports of the Everett Audit Company and Mr. S. J. Fisher, public utility inspector in charge, which reports were today submitted to the committee, we beg to submit the following:

The finding part of the Everett Audit Company's report is as follows:

"1. The said company had 20,111 accounts with subscribers on its rental ledgers on June 1, 1911. Because of the incomplete condition of its other records as of that date, it is impossible to determine the exact number of *bona fide* subscribers on that date.

2. The said company first had over 20,000 *bona fide* subscribers on October 10, 1911, as evidenced by the complete and combined subscribers' rental records, the engineer's installation records and wire chief's inspection records.

3. The said company has not served less than 20,000 *bona fide* subscribers from October 10, 1911, up to and including June 1st, 1912.

4. The said company had on June 1st, 1912, 23,214 *bona fide* subscribers who were being given complete telephone service."

The ordinance of June 28, 1909, granted to said Illinois Telephone and Telegraph Company, contains the following provision :

"If said company, its successors and assigns, shall fail to construct, equip and install a telephone system under the terms of said ordinance to said company of February 20, 1899, adequate for the service of 20,000 subscribers prior to June 1st, 1911, or if at any time after June 1st, 1911, said company, its successors and assigns, shall not have in operation or shall cease to operate a telephone system serving 20,000 *bona fide* subscribers, then and in each said case said company, its successors and assigns, shall also forfeit to the city or to any licensee or grantee of the city (designated or authorized by the city for this purpose) all rights acquired under said ordinance of February 20, 1899, together with its plant and equipment for telephone purposes. * * *"

Under date of March 6, 1912, we rendered you an opinion to the effect that if the company did not have in operation on June 2nd, 1911, and continuously thereafter a telephone system serving 20,000 *bona fide* subscribers, this would, under the terms of the ordinance of June 28, 1909, afford ground for a forfeiture to the city of all rights acquired by the company under said ordinance of February 20, 1899, together with said company's plant and equipment for telephone purposes. The opinion further stated that it was given on the assumption that the company was not delayed by acts of the City of Chicago from putting into operation by June 1, 1911, a telephone system serving 20,000 *bona fide* subscribers.

After the above mentioned opinion was rendered, the company claimed that it had been delayed in its work of construction and installation by interference and delays of city

officials and submitted to your committee what it denominated "a partial list of instances showing interferences and delays" and a writing purporting to set out a list of plans showing date of application and number of days in securing same from the Commissioner of Public Works, and a writing purporting to set out a list of permits showing date of application and number of days in securing same from the street department after the permit plan had been approved by the Commissioner of Public Works. It appears from said list and writings that substantially all of the alleged interferences and delays occurred during a former city administration.

Under date of May 21, 1912, Messrs. Sears, Meagher & Whitney, attorneys for the Chicago Tunnel Company, which had then acquired the properties of the Illinois Tunnel Company, sent a communication to you as chairman of the above mentioned committee, in which they referred to the alleged delays occasioned by the city and say:

"From these delays in the aggregate we think that you will find that the total delay caused the receivers by the city amounts to practically a year's time."

The matter of the alleged interferences and delays by the city was referred by this department to the Commissioner of Public Works with the request that we have the lists and writings submitted by the company checked with a view to ascertaining whether the alleged interferences and delays actually occurred, and also for a report as to the extension of time, if any, which might reasonably be claimed by the company on account of such interferences and delays as should be found to be validly claimed.

The Commissioner of Public Works thereafter transmitted to this office the above mentioned report of Mr. S. J. Fisher, public utility inspector in charge, dated June 26, 1912.

You will observe that Mr. Fisher's report states, among other things, the following:

"Upon investigation I find that the 'delays and interferences' claimed by the Illinois Tunnel Company actually occurred, the reasons for such delays being as follows: * * *

* * * * *

With reference to the lists hereto attached, the statements in one entitled 'Partial List of Instances Showing Interferences and Delays' are correct.

There are a few discrepancies in the list showing 'permit numbers, date of application, date received, etc.,' and I submit a list checked by this department which is correct."

Mr. Fisher's report concludes as follows:

"If the company had been permitted to conduct the work as its officers originally planned without the delays and interferences herein stated, I believe it would have been completed by February 1, 1911. This, however, could not be tolerated by this department, because many miles of well paved streets and alleys would have been in bad condition from that time until May or June following."

In the case of *City of Chicago v. C. & W. I. R. R. Co.*, 105 Ill. 73, the Supreme Court of this state held that where the City of Chicago had granted a license to the railway company to construct its road across the streets upon an express condition that the tracks authorized should be constructed within one year from the time of the grant and the company was prevented from completing its track within the year from injunctions and also by the police officers of the city acting under the direction of the Mayor, that the right of the company under the grant was not lost and that the city might be enjoined from interfering with the laying of the track after the expiration of the year when it was apparent that the same would have been completed within the time limited had it not been prevented by operation of law and the acts of the city authorities. In its opinion the court on page 79 quotes with approval from the case of *Fleming v. Gilbert*, 3 Johns. 528, as follows:

"It is a sound principle that he who prevents a thing being done shall not avail himself of the non-performance he has occasioned"

It is apparent from Mr. Fisher's report that the company was delayed to some extent in the prosecution of its work by the acts of the city. Mr. Fisher's estimate is that the company would have completed the work by February 1, 1911, if it had not been for the delays and interferences referred to in his report. As hereinabove stated, the company's at-

torneys claim that the delay caused by the city amounted to "practically a year's time."

It is a general rule that forfeitures are not favored in equity. A court of equity will not ordinarily lend its aid to a forfeiture but will prevent or relieve against a forfeiture whenever wrong or injustice will result from its enforcement.

Springfield, etc., Traction Co. v. Warrick, 249 Ill. 470;

Eaton v. Schneider, 185 Ill. 508;

Ebert v. Arends, 190 Ill. 221;

Wheeling, etc., R. R. Co. v. Triadelphia, 4 L. R. A. (N. S.) 321;

3 Dillon Mun. Corp. (5th Ed.), Sec. 1311.

The provision of the ordinance of June 28, 1909, requiring the company to have in operation a telephone system serving 20,000 *bona fide* subscribers by June 1, 1911, was a condition subsequent.

City of Chicago v. C. W. I. R. R. Co., 105 Ill. 73;

Belleville v. Citizens' H. Ry. Co., 152 Ill. 171;

Wheeling v. Triadelphia, supra.

The city was not required to insist on performance of this condition but had power to waive its performance so far as the time limit was concerned, if it saw fit so to do.

Chicago City Ry. Co. v. People, 73 Ill. 541.

The city has not up to the present time declared or attempted to declare a forfeiture for the breach of this condition. The company has not only shown an honest purpose and desire to perform this condition of the ordinance, but has now in fact performed the condition and on June 1, 1912, had in operation a telephone system serving 23,214 *bona fide* subscribers and is in active operation and steadily increasing the number of its subscribers.

If the company had not yet performed the condition and was standing defiant and refusing to perform, the case would present an entirely different aspect. Under such conditions a court of equity might be expected to enforce a forfeiture.

The company has invested a large amount of money in its telephone business and it is now serving more than the

number of *bona fide* subscribers required by the ordinance and is actively extending its business. If in fact the company did not have the full 20,000 *bona fide* subscribers on June 1st, 1911, no substantial injury has resulted to the city or its inhabitants therefrom.

We are of the opinion that under the facts shown in the reports of the Everett Audit Company and the public utility inspector in charge, the courts would not decree or sustain a forfeiture of the company's rights acquired under the ordinance of February 20, 1899, or a forfeiture of its plant and equipment for telephone purposes.

We transmit herewith the above mentioned reports of the Everett Audit Company and Mr. S. J. Fisher.

Yours respectfully,
BRYAN Y. CRAIG,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JULY 19 ,1912.

MR. EDWARD COHEN, City Collector.

Dear Sir:

Your inquiry concerning the license for the Logan Square Motor Club Garage, located at 2535 North Sacramento avenue, was referred to the writer for an opinion. You submit with your letter the report of the license officer and some data presented by parties interested.

We made a further investigation in order that we should be fully advised as to the facts in the case.

From the information at hand it appears that the building in question is partly occupied by the Logan Square Motor Car Company, a corporation which was organized, according to its charter, to sell automobiles, accessories and supplies. Later on the Logan Square Motor Club was organized, and the object, as stated in its charter, was "to organize and maintain a social club for the encouragement of motoring and for the mutual benefit of the members thereof, to own, run and maintain a club house and garage to be enjoyed by the members of the club."

There is but one telephone at the premises in question, and same is listed in the telephone directory under the name of Logan Square Motor Car Co., and in the classified portion of said directory this company is placed under the head of manufacturers and dealers in automobiles.

The building is a one-story structure with a small office, used by the Logan Square Motor Car Company, which keeps some cars in the garage on the premises for sale and for demonstrating purposes. The entire building with the exception of the small office is taken up with the storage of automobiles. There were twelve cars in same at the time our investigator visited the premises.

It is said that the Logan Square Motor Club has eighteen members, who pay dues of \$15 per month, and each member has the privilege of keeping his car in the garage. Some of the incorporators of the club are stockholders of the company.

Your inquiry is directed to the question as to whether it is proper for you to demand a license fee from the occupants of this building.

The decision of this question hinges on the proper interpretation of Section 2683 of the Chicago Code of 1911.

We have no reason to doubt that the club mentioned above is anything but what it purports to be; but, while it is probably a *bona fide* institution, if the members were permitted to do what they proposed, the effect of its organization would be to give the members of same a means of erecting a garage in a residential district and to run it without a license.

Section 2683 of the Code defines the word "garage" as a place where automobiles.

"are kept or let for hire or reward to any person, whether such vehicle be so hired out or let with or without an operator for same, or where such vehicles are kept ready for use and where rent is paid to the keeper thereof for such keeping."

The building has none of the appurtenances of a club in the sense of being a gathering place for social entertainment, and the privileges of the members seem to consist principally in the right to store their machines on the premises.

Our Supreme Court has held repeatedly that where a social club dispenses liquor to its members, it must take out a dram shop license; and on at least two occasions, in passing on the question, it held that such license was necessary notwithstanding the club was organized in good faith for social purposes and was not a mere device to evade the statute requiring dram shop licenses.

People, etc., v. Law & Order Club, 203 Ill. 127.

South Shore Club v. People, 228 Ill. 75.

People v. Craig, 155 Ill. App. 73.

The reasoning followed in the above cases applies equally in the present instance. Even assuming that the building in question was constructed by the club and was a sort of mutual enterprise, the place comes within the definition of a garage, as quoted above. It is a place where automobiles are kept for hire or reward, the person receiving the compensation for keeping same being in this instance a corporation organized for social purposes.

We are of the opinion, therefore, that it would be proper for you to demand a license fee from the club for maintaining this garage.

Yours respectfully,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JULY 22, 1912.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Your request for an opinion as to the legality of the order passed by the city council July 15, 1912, and appearing on page 1340 of the council proceedings of that day, ordering the Commissioner of Health to cancel the license issued for the operation of Sheridan Park Hospital, was referred to the writer for an opinion.

The order in its preamble assumes that the Chicago Railways Company is operating the hospital in question and de-

clares that certain practices indulged in result in injustice and that the said company is not empowered by its charter or by any provision of its franchise to operate a hospital.

We have made inquiry with regard to the issuance of the license for this institution and find that the application was made by the Sheridan Park Hospital and same was signed by Dr .Robert C. Menzies as its president. It was represented that this company was about to engage in the business of running a general hospital.

In the face of the information at hand it would not be proper to take it for granted that the hospital is being run by the Chicago Railways Company. In case it could be shown that the Chicago Railways Company is actually operating the hospital, then it would next have to appear that they are operating it for a different purpose than as a part of and in connection with their business of operating street railways, and finally, even if that were made to appear, it is doubtful whether the proper procedure for attacking this institution is by the revocation of its license.

The ordinances require that when an application is made for a license of this kind, it is the duty of the Commissioner of Health to make strict inquiry in regard to the facts stated in the application, which relate to the location, the purposed accommodations, the nature and kind of treatment and the qualifications of the chief physicians and surgeons attending same.

The ordinances further provide that if, upon such inquiry, it is found that the place is to be conducted properly and under such conditions as will render the heads of such hospital responsible for the medical and surgical treatment given herein, the Commissioner of Health shall recommend that the license be issued and then "upon the payment by the applicant of the license fee hereinafter provided to the City Collector, the Mayor shall issue, or cause to be issued, a license," etc.

You will observe from the above quotation that the issuance of such license is not discretionary with the Mayor, nor can the Commissioner of Health act arbitrarily in the matter. If the conditions of the ordinances are complied with,

it would be within the power of the corporation applying for such a license to compel the issuance thereof. Consequently the order in question is invalid, first, because it requires the Commissioner of Health to cancel a license which was issued by the Mayor; and second, because it is not within the power of the Mayor to cancel such license if the same has been properly issued.

Yours respectfully,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

JULY 23, 1912.

HON. L. E. MCGANN, Commissioner of Public Works, City of
Chicago.

Dear Sir:

Your favor of July 10, 1912, addressed to the Corporation Counsel in regard to the construction of a bridge at North California avenue over the Chicago River, was duly received. After stating that there is no roadway either north or south of the Chicago River at that point; and that it is intended to proceed to condemn land for a street to connect with the proposed bridge, you ask for an opinion on the following question: "To secure confirmation of an assessment for the proposed condemnation, is it necessary to construct a bridge or passageway over the river, or is the fact that a bridge is authorized and provision made for payment by the city, sufficient to secure a confirmation of assessment for the purpose of condemning land for a street?"

In my opinion it is not necessary that the bridge should be actually constructed in order to obtain a confirmation of the assessment; but the contract for the bridge should be let and an appropriation to pay therefor should be made, before the trial of the condemnation proceeding.

I am further of the opinion that the fact that the bridge is authorized and provision made for payment by the City would not be sufficient alone, in the absence of the actual

letting of the contract, to support a confirmation of the assessment.

The principle on which my conclusions are based is contained in the cases of *Hutt et al. v. City of Chicago*, 132 Ill. 352, and *City of Waukegan v. Burnett*, 234 Ill. 460. In the case of *Hutt et al. v. City of Chicago, supra*, it was held that where, in a condemnation proceeding for the extension of a street which is to cross a river, no provision for a bridge over the river was made by the city, it was improper to assess the property along such proposed street for benefits it might derive from a street with a bridge over the river which might not be built by the city. In this case the court said, page 359:

“When the City of Chicago deems it wise to improve a street by the erection of a bridge, the nature and character and cost of the structure will be determined, and then it can with some degree of accuracy be determined what benefit appellants’ property will receive from such an improvement, and it will be time enough then to assess their property with benefits to be derived therefrom.”

In the case of *City of Waukegan v. Burnett, supra*, in which it was proposed to condemn land for the purpose of constructing a sewer thereon, the court said (page 462):

“We think that before the appellee had the right to assess appellants’ property to pay for the property sought to be acquired it should have provided by ordinance for a system of sewers to be constructed therein, from which ordinance the appellants could determine the character of the improvement which was proposed to be made by the city. Without notice of the character of sewers which were to be laid the appellants could not determine whether their property would be benefited little or much, or at all.”

On a strict literal interpretation of these cases the assessment could not even be spread before the contract for the construction of the bridge is actually let. It may be, however, if the assessment were spread on the theory that a good, substantial bridge would be constructed, even though the specifications therefor were not in existence at the time, and if afterwards the contract for a bridge of a proper and substantial character were let and there was an appropriation

to pay for the bridge, before the hearing of the case the assessment would be valid and the confirmation could be entered thereon.

In the present case the only action that the city has taken in reference to the building of the proposed bridge is to appropriate \$15,000.00 for the construction of the bridge. This appropriation is contained in the Annual Appropriation Ordinance of January 2, 1912, and appears as follows: "Bridges to be constructed as soon as practicable * * * North California avenue \$15,000.00." (Council Proceedings 1912, pp. 2372 and 2373.) The money to be used for this appropriation is to be obtained from the proceeds of bridge bonds which have been voted on favorably.

In accordance with the views I have expressed, I am of the opinion that this provision alone is not sufficient to support the assessment in the proposed condemnation proceeding but that in addition thereto there must be a contract actually let before the condemnation proceeding comes on to be heard.

Respectfully submitted,
FRANK JOHNSTON, JR.,
Assistant Corporation Counsel.

Approved:

PHILIP McKENNA,
Attorney Board Local Improvements.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JULY 23, 1912.

ELMER E. JACKSON, Esq., 35 N. Dearborn St., Chicago, Ill.

Dear Sir:

Your letter addressed to the Corporation Counsel relative to the proposed new location of the Chicago Refuge for Girls, was referred to the undersigned for consideration and reply.

You state in your letter that the institution which you represent is now located at 5024 Indiana avenue, where it has been for many years, and that the city contributes to-

ward the expense of maintaining girls sent to the institution by order of the Juvenile Court. You state further that the managers of the institution now regard the place as too small and too much within the residential portions of the city, and are contemplating its location at a new site and the erection of buildings on a larger scale. You ask three questions which you want determined before settling upon the future action of this institution. These questions arise from the fact that it will be necessary to go some distance from the built up portions of the city and possibly outside of the city limits altogether.

You first ask whether the location of the institution outside of the city limits would necessarily terminate the arrangements with the city for the sending of delinquent girls to same by the Juvenile Court, and thus cut off the contribution towards its support which the city is making. There does not appear to be anything in the statutes or the ordinances which interferes with the practice that has grown up, either as a result of contract or otherwise, of sending such delinquents to this institution and paying for the expense of maintaining them. The Cities and Villages Act provides that in case the city prosecutes for any violation of the city ordinances and imposes a fine or penalty, the parties so punished may be sent to the "county jail or calaboose, city prison, work house, house of correction, or other place provided by the city or village for the incarceration of offenders." (Article V, Section 7.)

You will see from this, if the county penal institution were located outside of the city limits, there would be nothing to prevent offenders of this kind from being sent there. Moreover in the case of delinquent girls that you speak of, the city loses jurisdiction immediately after their appearance in court, and they are transferred to the Juvenile Court; consequently they are within the jurisdiction of the court and liable to be sent to such place as the court has the power to send them to. If, in its discretion, the court sees fit to send them beyond the limits of the city, there is no reason why the city should not pay the expenses of maintaining them as it has done hereto-

fore—always assuming, of course, that they are guilty of offenses against the city ordinances.

In your second question you indicate that a site in prospect immediately adjoins the city and is not within the limits of any other city or village. You inquire whether it would be well to have the property so purchased for this purpose annexed to the city and whether it could be readily accomplished. The only way in which unincorporated territory can be annexed to the city is by petition signed by a majority of the legal voters and a majority of the property owners of such territory, and it must then be submitted to the vote of the people within the city. (See Annexation Act of 1872.) There is no way for the city to forcibly annex such territory, since the courts have held that part of the Act of 1872 which provides for same unconstitutional.

Your third question relates to the work of the Board of Education. You state that the necessary teachers have heretofore been assigned to this institution by this board and the regular school work has been carried on, and you ask if this could be accomplished if the institution is located outside of the city limits. The sending of teachers outside of the boundaries of the municipality seems to be beyond the powers of the Board of Education. Section 132 of the act creating this board provides that the same shall have charge and control of the public schools in such city, and the enumeration of the powers and duties of the board in that and the two succeeding sections conveys the impression all the way through that such powers and duties are limited strictly to schools within the municipality. It is our opinion, therefore, that the board of education could not send teachers to your institution if it were located outside of the city.

There do not seem to be any decisions of the reviewing courts on the precise questions that you ask, and our interpretation of the statutes necessarily is based on the view we take of same from the wording; but we believe that we

have given a reasonable construction of the provisions of the law on the three questions that you have asked us.

Yours respectfully,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

JULY 29, 1912.

EDWIN L. LOBDELL, Esq., Pres. Sheridan Road Improvement Assn.

Dear Sir:

Your communication of the 22d instant, which requests this department to aid your association in the proposed transfer of "Sheridan Road" north of Hayes avenue, to the Commissioners of Lincoln Park requires a construction of the Act of the General Assembly "to enable park commissioners or corporate authorities to take, regulate, control and improve public streets leading to public parks, etc." (approved and in force April 9, 1879), and of the Act "to provide for the organization of park districts, etc." (Approved June 24, 1895, in force July 1, 1895.)

The first act provides that every board of park commissioners shall have power to acquire streets for boulevard or driveway purposes to connect with any public park, if the corporate authorities of the municipality in which such street may be located and a majority of the property owners according to frontage on such street shall consent thereto.

The act further provides that such park commissioners may surrender or abandon any such streets, with the consent of the corporate authorities and property owners, as above.

The act of 1895 provides that any street, etc., within the limits of any park district so organized, may be taken charge of and maintained by such district as a pleasure drive or boulevard, if the corporate authorities and the majority of the property owners according to frontage consent thereto.

If such street shall have already been set apart as a pleasure driveway or boulevard the consent of the property owners is not required.

After the organization of the park district in question, the city council passed an ordinance, March 18, 1901, turning over to the Board of Commissioners of the North Shore Park District, part of Sheridan Road lying north of Hayes avenue.

There is nothing in the ordinance which would go to show that said street had already been established as a pleasure driveway or boulevard and no mention is made of the written consent of the property owners.

The law of 1895 does not contain any provision for the surrender or abandonment of any street that may have been turned over to the Board of Park Commissioners of a district thus created, unless the word "control" can be held to embrace the power to surrender or abandon.

Since these districts are granted the power to levy taxes I doubt that the commissioners possess the power to abandon any street turned over to such a park district, unless they may do so under the Act of 1879.

To accomplish the purpose this would require:

1. The consent of the majority of property owners according to frontage in the street sought to be abandoned.
2. The passage of an appropriate ordinance by the Board of Commissioners of the North Shore District, declaring the surrender and abandonment in favor of the municipality which turned over the street.
3. An appropriate ordinance by the City Council accepting the surrendered street and the reversion of title in the public for street purposes.

All these acts done, the city council may pass an ordinance turning Sheridan Road over to the commissioners of Lincoln Park.

Any assistance that this department can render will be rendered with pleasure.

Very truly yours,
NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

AUGUST 2, 1912.

DR. G. B. YOUNG, Commissioner of Health.

Dear Sir:

Your letter to the Corporation Counsel, in which you inquire whether you can accept the proposal made in response to your advertisement for bids for the disposal of dead animals and make a contract under same without further action on the part of the City Council, was referred to the undersigned for consideration and reply.

The contract for the removal of dead animals expired some time ago, and you undertook to make a new contract under the provisions of sections 1484-5-6 of the Chicago Code of 1911. These sections of the Code authorize and empower the Mayor and Commissioner of Health to advertise for bids and to enter into a contract for the removal of dead animals for a period of not less than one year nor more than five years, in case it can be done without it being necessary for the city to incur the expenditure of money.

We are informed that you made two efforts to secure a bid which would enable you to make a contract of this kind, but that each time the bids called for the expenditure of money on the part of the city, and consequently, you were unable to follow out your intention.

After advising with this department, the matter was placed before the City Council and was then referred to the Finance Committee. While the Finance Committee had the matter under consideration, there was considerable talk about merging the contract for the removal of dead animals with the contract for the disposal of garbage, which was also under consideration at the same time.

It is not necessary to go into details concerning the attitude of the Committee on Finance in regard to the proposed merging of the two contracts, for it seems that after going into the matter in all its details, the Council decided to advertise for bids for the two contracts separately. The result was that on July 8, 1912 (C. P. 1143) the City Council ordered that the Commissioner of Public Works be authorized, in conjunction with the Commissioner of Health and the Corporation Council, to prepare specifications for the disposal of gar-

bage and to advertise for bids, and it further ordered that the Commissioner of Health be authorized and directed to at once advertise for bids for the disposal of dead animals for a period of five years.

It is quite plain that the City Council intended to authorize you to proceed independently in regard to the contract for the removal of dead animals, and evidently contemplates that you should make a contract under section 50 of the Code, which would provide for compensation to the parties who undertook the work. In doing so, it failed to take notice of an opinion given to you some time ago to the effect that if a contract were to be let in this way, it could be done legally only for the balance of the current year with a provision for the extension of same for six months. A contract for five years, which involved the expenditure of money for this purpose, would be of doubtful validity.

Upon advertising, however, you received a proposal under which the bidder offer to do the work and pay the city \$125 for a five year term, payable in annual installments of \$25. Therefore, the question whether city can lawfully enter into a five year contract involving the expenditure of money does not now come up, but you are uncertain as to whether you can enter into a contract under the sections above referred to upon a bid received in this way. We are of the opinion that the Mayor and the Commissioner of Health may enter into this contract with the bidder.

It is true that the ordinance contemplates that the Mayor and Commissioner of Health should advertise for bids on their own responsibility, but the mere fact that the City Council by an order expressly authorized the Commissioner of Health to advertise for precisely the same thing does not invalidate bids received under such an advertisement, providing the Mayor ratifies the action of the Commissioner of Health in so advertising. It will be necessary to obtain the Mayor's acquiescence and his sanction for entering into the contract, but when that is obtained the advertising and bidding will be on the same footing as if the Mayor and Commissioner of Health had at the start prepared the advertise-

ment and received the bids without action on the part of the City Council.

It was clearly intended by sections 1484 and 1485 to vest a large discretion in the Mayor and Commissioner of Health in regard to making a contract of this kind, and the effect of same is to give them the right to enter into such a contract in case they can obtain a bid from a reliable and responsible party. It cannot be assumed that it was the intention of the City Council to hamper these officers by limitations on the manner of asking for bids.

It will, therefore, be entirely proper to enter into such a contract in conjunction with the Mayor.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

AUGUST 6, 1912.

HON. JAMES S. McINERNEY, Prosecuting Attorney.

Dear Sir:

We are in receipt of your communication of the 30th inst. requesting an opinion as to what constitutes a restaurant within the meaning of article XV entitled "Restaurants" of Ch. XXXVIII of the Chicago Code of 1911.

The code does not define the word restaurant. It is held in the case of *Lewis v. Hitchcock*, 10 Fed. 4, that "The term 'restaurant' has no definite legal meaning." A like holding is found in the case of *Richards v. Washington, etc., Ins. Co.*, 60 Mich. 420. We must therefore look to the meaning of the word as currently understood.

In the case of *Lewis v. Hitchcock*, *supra*, the court speaking of the term "restaurant" held that "as currently understood it doubtless means only, or chiefly, an eating-house."

In Webster's Dictionary the term restaurant is defined as "an eating-house" and the same authority defines an eating-house as "A house where cooked provisions are sold to be eaten on the premises."

In the case of *Cecil v. Green*, 60 Ill. App. 61, the court in deciding a case brought under the Civil Rights Act, cited and adopted Webster's definition of a restaurant and of an eating-house.

The Century Dictionary defines an eating-house as "A house where food is served to customers; a place of resort for meals, a restaurant."

Cyc. (Vol. 34, p. 1677) gives the following definition of a restaurant:

"Restaurant. An establishment for the sale of refreshments both food and drink; a place for refreshment; a house where liquors and cooked food are sold; an eating house; an eating house; a place where something to eat, ready prepared or which can be readily prepared, may be obtained; an eating house; a place where eatables can be obtained at all reasonable hours."

The City of Louisville defined a restaurant by ordinance as follows:

"Every place where food or refreshments of any kind * * * not including spirituous, vinous or malt liquors * * * are prepared for casual visitors, and sold for consumption therein, shall be deemed a restaurant or eating house."

See *New Galt House Company v. Louisville*, 17 L. R. A. (N. S.) 566.

We are of the opinion that a restaurant within the meaning of the article of the Chicago Code of 1911, above referred to, may be generally defined to be a place where food ready prepared for consumption, or which can be readily prepared for consumption, may be obtained and eaten on the premises by the general public.

Yours truly,

BRYAN Y. CRAIG,
Assistant Corporation Counsel.

Approved:

MACLAY HOYNE,
Acting Corporation Counsel.

AUGUST 9, 1912.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

You made a verbal request for an opinion as to the status of an ordinance which received the votes of thirty-five aldermen in favor of its passage, there being at the present time but sixty-nine members elected in the City Council.

Section 13, article 3, of the Cities and Villages Act, relating to the taking of yeas and nays upon the passage of all ordinances or propositions creating a liability against the city, or for the expenditure or appropriation of money, specifically provides that:

“The concurrence of a majority of all the members elected to the city council shall be necessary to the passage of any such ordinance or proposition.”

The Supreme Court in the case of *McLean v. City of East St. Louis*, 222 Ill. 510, 513, has recently interpreted the section and article above referred to and passed particularly upon the meaning of the language quoted. In this case it was expressly decided that a vacancy in the city council did not decrease the number of votes required for a majority. The case further decides that the mayor cannot be counted in order to make a quorum in the city council, nor is he entitled to vote except in case of a tie.

At the present time by law the City Council of the City of Chicago consists of seventy members to be elected from the thirty-five existing wards. Thirty-six votes are necessary to constitute the statutory majority in favor of any ordinance. This is true even if as at present there are but sixty-nine members elected in the city council by reason of a vacancy. It is immaterial whether the vacancy is due to resignation, death, or any other cause. The mayor is without authority under the statute to add his vote to the votes of thirty-five aldermen in favor of an ordinance passed under these conditions, and it cannot be said that an ordinance receiving thirty-five votes in the city council under such conditions has been passed by a tie vote of the aldermen and the deciding vote of the mayor.

Yours respectfully,

MACLAY HOYNE,
Acting Corporation Counsel.

AUGUST 15, 1912.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

In pursuance of the suggestion of the City Comptroller at the conference in your office in relation to the city's revenues, we present to you a brief review of the situation which has arisen on account of the recent decision of the Supreme Court in the case of *People, etc., v. T., St. L. & W. R. R. Co.*, 254 Ill. 472. While this decision affects only that part of the revenue which is raised by general taxation, we have deemed it advisable to touch upon the revenues from other sources as well, in order that you may have a complete statement of facts at hand. We include in this statement, for the same reason, many things on which you are already fully informed, but which are thus placed before you for ready reference.

The revenues of the city which are used for general corporate purposes may be roughly divided into two classes—those which are derived by taxation through the county taxing authorities, and those which are derived from licenses and miscellaneous sources. We are not taking into consideration moneys raised from the sale of water, from bond issues or by special assessment, since these are not involved in the question before you.

The money which is derived from licenses and miscellaneous sources is available as soon as the same is collected. All amounts thus received during the current year can be used for the expenses of the current year. The money which is derived from general taxation, however, is not directly available during the year for which it is collected. The law does not contemplate that taxes should be paid in advance.

When the city passes its appropriation bill and its tax levy ordinance, it authorizes the expenditure of money emanating from both of these sources. From the one source the money comes in from day to day and it can be used immediately. The money from the other source would not, in the regular course of business, come into the city treasury until the following year. In order to enable the city to use the money from general taxes the same year that the levy is made, the statute provides that the corporate authorities may dis-

pose of anticipation warrants drawn against the tax levy for the current year to the extent of seventy-five per cent. of the tax levied.

In this way it has become the regular custom to spend three-fourths of the money to be realized from general taxes before the taxes are collected. It is necessary to do this, because the law makes no provision for collecting the taxes at the time the money is to be used.

This has resulted in the anomalous situation that confronts the administration, whereby it is short of revenues for the current year; although the amount of taxes collected apparently place the finances of the city in most excellent condition, the real situation is that the city is short on its appropriations for the current year.

The levy and extension of taxes for the city, as well as for all other taxing bodies, is controlled and governed by what is known as the Juul law, as amended in 1909. The wording of this law is somewhat involved, and its provisions have been frequently misunderstood. The language used in the law is general in its nature, but by a series of provisos and exceptions its application is narrowed down so that less and less of its provisions apply to other counties and municipalities, and finally we come to a point where all the rest are excluded from the remaining provisions, and we find that only the City of Chicago is affected by them. Thus the people of Chicago are the only ones who are reached by all the provisions of the law, although some of its provisions apply throughout the state.

The various taxing bodies, including cities, towns, villages, school districts, park commissions, drainage districts, etc., of which there are about 500 in Cook County, each year certify to the County Clerk the amounts they require to be raised for taxation. The amount so required is in each case compared with the total assessed valuation of the property within the territory of the taxing body, and the rate demanded by each is thus determined. This is subject to the maximum rate prescribed by law in each instance, and in case this maximum has been exceeded the excess is disregarded. The County Clerk then adds together the rates thus ascertained for each

taxing district, and determines which territory in the county would have the highest rate of taxation if all the taxing bodies were to receive what they ask. This highest rate, wherever it is, whether in the city itself or in some remote part of the county, must be scaled down to three per cent. by taking from the rate demanded by each taxing body its proportion of the excess. The reduced rate thus determined for each taxing body holds good throughout its territory. This process is continued until the rate is three per cent. or less in all the territory within the county.

The scaling process described above is, however, subject to two exceptions. One is the minimum rate, below which a tax levy cannot be scaled. The other is the exclusion of certain tax levies from the total which is to be subjected to the scaling process. It is on account of these exceptions that confusion has arisen.

The city's minimum rate, below which it cannot be scaled, is fixed by the Juul law at \$1.10 per \$100 of assessed valuation. If, in addition to this \$1.10, the city were to receive the full amount of its levy for the payment of the interest and principal of its bonded debt, there would be no difficulty. If, on the other hand, the rate is to be scaled down so that the \$1.10 shall include the levy made for the payment of the interest and principal on its bonded debt, the city will be seriously crippled in its financial affairs.

As stated above, the various taxing bodies, the county, city, school board, sanitary district, park commissions, drainage district, etc., are given authority under the statutes to make a tax levy each year for the running expenses of the year. There is a limit placed on this power in most instances, so that no excessive levy can be made—in the case of the park commissions no limit has been fixed. Prior to the year 1909, the limit for the city was fixed at \$2 per \$100 of assessed valuation for the county at seventy-five cents, for the sanitary district at \$1, for the school board's educational purposes, not including school buildings, at \$2.50, for tuberculosis sanitarium at ten cents, for public library at ten cents, while the park districts were not limited. Thus there was a possible

\$6.45, to which could be added a park and town tax that was not limited, and the total was subject to scaling.

The above figures are interesting, not only because they show how much the total would be likely to be, but also because they indicate that the Juul law as originally enacted and construed did not reduce taxation to so great an extent as popularly supposed.

At the time (before 1909) the Juul law provided for an assessed valuation of one-fifth of the full valuation, and a limitation of five per cent. on the rate of taxation. Hence the above maximum rates were subject to a reduction which brought them within a total (including park and town taxes) of five per cent.

In 1909 the Juul law was so altered that the assessed valuation became one-third of the full valuation, and a limitation of three per cent. was placed on the rate of taxation. It is generally conceded that the purpose of making this change was to provide a larger assessed valuation as a basis for bonded indebtedness. If the maximum rates of all taxing bodies had been reduced correspondingly there would have been no change in their relative taxing powers. But at the same time that the amendment to the Juul law was enacted, an amendment to the Cities and Villages Act was passed reducing the maximum limit of taxation for the city to \$1.20 per \$100, the school board's educational maxim limit was reduced to \$1.50, the library's maximum limit was reduced to 6 cents, while the maximum rate for the other taxing bodies remained the same. Consequently there is now a possible total of \$4.61, to which must be added the park and town tax, and the total is subject to scaling down to three per cent.

It will thus be seen that the city is at the outset handicapped before the scaling process begins, since most of the other taxing bodies may continue to levy at the old rate, while the city is limited to three-fifths of its old rate, and it is certain that the scaling would necessarily reduce the city below the minimum fixed by law if the minimum did not check it.

The result is that the city can count on only its minimum rate of \$1.10 under any circumstances, no matter what the amount of its tax levy. But, as was stated above, if the city

would have the right to add to that minimum the amount levied for principal and interest on its bonded indebtedness, no serious difficulty would arise.

In every instance where the maximum tax rate is fixed for a taxing body, such maximum rate is exclusive of any levy made for interest or principal on its bonded indebtedness, which under the constitution must be provided for. Such maximum rates are not fixed in the Juul law, but in other acts relating to the particular taxing bodies or in the constitution. The Juul law fixes minimum rates only.

Even in the law of 1909 mentioned above, by which the city's maximum rate was reduced to \$1.20, the reduction was made with the provision that the new maximum rate was exclusive of the levy to take care of the bonded debt.

Other laws have been enacted which seem to indicate that the Legislature never contemplated anything else but that the bonded debt should be taken care of outside of the three per cent. limitation, notably the Act of 1909 which requires that all new bond issues of cities and villages must be submitted to the voters. the apparent intention being to avoid additional taxation unless it was so ratified.

The Juul law itself contains a provision to the effect that "no reduction of any tax levy made hereunder shall diminish any amount appropriated by corporate or taxing authorities for the payment of the principal or interest on bonded debt."

When this department first took up the matter of the proper levy and extension of taxes last fall, it was found that the County Clerk had for several years construed the Juul law to require him to add to the rate fixed after the scaling process above defined, an additional rate for so much of the amount levied for interest and principal on bonded indebtedness as would take care of the bonds issued after the enactment of the Juul law in 1901. Consequently part of the bonds were taken care of within the rate fixed under the Juul law and part of them by an additional levy. Thus for the year 1910 (collected in 1911), the tax levy under the three per cent. prescribed by the Juul law included \$1,138,922.50, which was levied for sinking fund and interest on bonds issued before

1901, and the sum of \$1,677,228.75 was levied over and above the three per cent. limitation to take care of sinking fund and interest on bonds issued since 1901. We were convinced that this was an arbitrary classification not warranted by law. Moreover, the other taxing bodies were receiving the benefit of an additional levy to take care of their bonded indebtedness on the theory that such bonds had been issued after a vote on same at an election. This seemed a discrimination not justifiable under the law.

We, therefore, took up the matter with the County Attorney, and he agreed with us that there was no ground for such a classification, and under the authority of two cases which had recently been decided by the Supreme Court, it was determined that it was proper to exclude all taxes levied to take care of bonded indebtedness from the scaling process and to levy for same outside of the three per cent. limitation.

This resulted in a fair rate being fixed for the city for 1911, and its financial interests for that year were well taken care of. Moreover, the very slight addition which was caused thereby to the total of the rate of taxation was so trifling that no complaint could be made. The total addition to the rate was less than 10 cents on the hundred dollars, and a part of this resulted from the additional bonds voted last year.

The tax levy was extended on the above basis in December, 1911, and most of these taxes have been collected. Only a few objections were filed. The objections were in almost every instance made by railroad companies. While the sums involved in these objections are considerable, they form so small a proportion of the aggregate of the taxes that it can be said that the revenues for the year have not suffered an appreciable diminution from the amount which the city expected to realize.

During the year an appeal was taken from the County Court of Madison County to the Supreme Court on an objection involving the question of the right to exclude the tax to pay the bonded indebtedness of a sanitary district when scaling the taxes of the County to the three per cent. limitation. The particular case involved only a trifle in money and

entirely escaped publicity. But the principle involved is of the highest importance to the city. The Supreme Court decided that the tax to provide for the bonded indebtedness must be included before the scaling process is used.

The city was not represented in the case, and it is doubtful whether it would have been permitted to interplead if it had received notice of the case in time. The first information which the public or the City Law Department had was when the advance sheets containing same were printed and mailed—about July 15th. The decision was rendered on June 22d, and the time to petition for rehearing had gone by. The case in question is the one mentioned above—*People, etc., v. Toledo, St. Louis & Western R. R. Co.*, 254 Ill. 472.

In the meanwhile, as stated before, certain objections to the tax as extended in December, 1911, were filed in the County Court of Cook County.

The County Court decided these cases adversely to the taxing bodies, following the decision of the Supreme Court in the above case. Appeals have been taken to the Supreme Court, so that if deemed advisable the matter can be brought to the attention of the court and argued out on these cases. There are some reasons for not pressing the appeals, and this department, if the fight is to be made in the courts, favors an original proceeding on a petition for mandamus before the Supreme Court rather than the prosecution of these appeals.

The decision is generally regarded as applicable to all taxing bodies having territory within the city. The County Attorney states it is his intention to advise the County Clerk to extend the rate in accordance with this view. If this is done, the amount which the city will lose in revenue, based on the equalized assessed valuation of all property in 1911, will be \$3,701,682.81.

The above figure is subject to some modification, since there will undoubtedly be considerable change in the assessed valuation of taxable property within the city.

Assuming that no relief can be had, the effect on the city's financial condition of such a diminution of the revenues can best be shown by a comparison with conditions in 1910 and 1911. The following table will illustrate this:

1910.

Total valuation of city property.....	\$2,546,983,608.00
Assessed valuation	848,994,536.00
Total of tax levied by ordinance, including sinking funds and interest on bonds.....	13,490,856.99
Amount of above levied for bonded indebtedness	2,816,151.25
(Of above, \$1,138,922.50 was for bonds issued prior to July 1, 1901, and \$1,677,228.75 was for bonds issued after July 1, 1901.)	
Amount realized exclusive of levy for bonded indebtedness	7,963,408.76
Amount realized on levy for bonded indebtedness	1,677,228.75
Total amount collected from general taxation after deducting loss and costs.....	9,640,637.51
Revenues for corporate purposes exclusive of bonds and taxes.....	11,433,755.10

1911.

Total valuation of city property.....	\$2,786,922,612.00
Assessed valuation	928,974,204.00
Total of tax levied by ordinance, including sinking fund and interest on bonds....	17,961,547.34
Amount of above levied for bonded indebtedness	3,009,149.47
(Of above, \$1,101,519.27 was for bonds issued prior to July 1, 1901, and \$1,907,630.20 was for bonds issued after July 1, 1901.)	
Amount realized exclusive of levy for bonded indebtedness	9,654,626.88
Amount realized on levy for bonded indebtedness	3,009,149.47
Total amount collected from general taxation after deducting loss and costs.....	12,663,776.35
Revenues for corporate purposes exclusive of bonds and taxes.....	11,505,590.09

1912.

Total amount of tax levy ordinance, including sinking fund and interest on bond..\$	18,162,429.30
Amount of above levied for bonded indebtedness	3,701,682.81

It will be seen from the above that while the total amount levied is in excess of the amount levied in 1911, such excess

is not necessarily due to any increase in current expenditures. The larger amount levied is in a measure due to the fact that a large additional amount had to be appropriated to take care of the bonded indebtedness of the city.

Further elaboration of the above figures is not necessary since they present the entire situation.

Assuming that retrenchment to so great an extent is impossible, relief from this situation can be obtained only in one of two ways: either the Supreme Court must decide that the taxes for the current year should be extended in such a way that the bonded indebtedness is not included within the 3 per cent. limitation, or else a special session of the legislature would have to be called in order to meet the emergency. Unless this relief is obtained from either of these sources there would necessarily be a deficit for the year. The legislature cannot at its regular session change the situation because by that time under the law the taxes will already be extended and due. In fact, a large amount will already have been paid in. All taxing bodies having territory within the city limits are similarly situated. The County and the Sanitary District are, if anything, more seriously affected than the city. It is quite likely, therefore, that the other taxing bodies will want to act with the city in the matter.

There are two methods of attack in the Supreme Court. One is to attack the constitutionality of the Juul law. It seems to be vulnerable in at least three particulars. It is doubtful whether a law making such classification as this does, by which the City of Chicago is placed in a different position than other municipalities without any reasonable cause, would stand the test of constitutionality. Again, there are municipalities which extend over parts of two different counties. In those municipalities the law necessarily results in inequality of taxation which is contrary to the constitution; and finally it is questionable whether, in view of the recent decision of the Supreme Court in the university case, the law has been duly enacted.

Another way of making the fight in the courts is by undertaking to convince the Supreme Court that the Juul law contemplates that bonded indebtedness should be taken care

of outside of the limitation of 3 per cent. This is far from hopeless, because the very decision which has precipitated this situation fails to pass on the particular portion of the law which is quoted above. It may be possible even for the court to hold to the effect that bonded indebtedness should be so taken care of without receding from its position as expressed in the case in question. In other words, while it may be proper to include the bonded indebtedness for the purpose of fixing the rate, still, when the rate is fixed, a readjustment ought to be made which will make it possible to take care of such bonded indebtedness, and such reductions as are provided for in the act could be made only in the proportion that the other part of the tax levy bears to the whole. It is true that at first blush this seems to be rather a strained construction of the law, yet when it is considered along with all other enactments and the wording referred to above, there is a possibility of obtaining a decision which will relieve the situation at least to a limited extent.

We have endeavored in the foregoing statement to cover all the important features of the present situation in such a way that they may be readily referred to.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

MACLAY HOYNE,
Acting Corporation Counsel.

AUGUST 17, 1912.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

On May 27th Mr. Joseph O. Kostner, Deputy Commissioner of Public Works, forwarded to this office a copy of a letter of Mr. Ricard O. Burke, Assistant Engineer in charge of Division of Rivers and Harbor, asking how far public corporations, including park boards, state appointed boards, and committees operating over an area within the city limits, are bound to comply with the ordinances of the city governing the harbor.

One of the instances from which this inquiry arises was the fact that the harbor police reported that two men in the employ of the North Shore Park District had been dumping brush and tree stumps at the foot of Farwell avenue, Rogers Park, and that it is contended by Charles H. Johnson, President of said park district, that no permit from the city for dumping is necessary.

It appears that this is one of the many instances in which harbor police and other city officials seeking to enforce the requirements of the city code, are met by a denial of city jurisdiction.

Mr. Burke is desirous of a clear definition of the city's powers, not alone that the city may be able to enforce all proper ordinances, but that unnecessary arrests and conflicts of authority may be avoided. He states that the present practice as regards dredging and park work, is to require permits to be taken out, but not to take any fee where the work is done by the United States government, the Sanitary District, the Canal Commissioners, or any like public body, doing work of this class.

Section 1097 of the Chicago Code of 1911, provides in part as follows:

“The harbor shall consist of the Chicago River and its branches to their respective sources, the Ogden canal, all slips adjacent to and connecting with the Chicago River, the Calumet River and all slips connecting therewith, the drainage canal, all piers and basins, and the waters of Lake Michigan, including all breakwaters, piers and permanent structures therein for a distance of three miles from the shore between the north and south lines of the city extended. * * *”

Section 1127 of the Chicago Code of 1911 provides in part as follows:

“No person shall drive or place, or cause to be driven or placed, any pile or piles, stone, timber, earth or other obstruction of any kind whatsoever, in the harbor of the city, or build, construct or repair any dock therein, or build or cause to be built any bridge or other structure across the Chicago River or any of its branches or across the Calumet River, or drive or place or cause to be driven or placed any pile or piles or timber or make

any excavation for the purpose of furnishing or laying foundations for any building or structure at any point within forty feet of any part of the harbor, without permission in writing from the commissioner of public works so to do. * * *

Difficulties usually arise from officers and employes of park districts refusing to take out permits from the city as provided in section 1127.

The North Shore Park District was organized under "An Act to provide for the organization of park districts and the transfer of submerged lands to those bordering on navigable bodies of water," approved June 24, 1895. The said park district has a small park on the shore of Lake Michigan, extending for a half block both north and south on Farwell avenue, the foot of Farwell avenue at the lake being bounded on the north and south by this park.

The powers of the park district are set forth in the aforesaid act as follows:

Section 11 (in part): "The commissioners * * * shall have power to pass all necessary ordinances, rules and regulations for the proper management and conduct of the business of said board and of said corporation and for carrying into effect the objects for which said park district is formed. They shall have full power to manage and control all the officers and property of said district, and all parks, boulevards and driveways maintained by such park district, or committed to its care and custody. They may by ordinance regulate and restrain the use by the public or by individuals of any or all such parks, boulevards and driveways, * * * and may prescribe such fines and penalties for the violation of ordinances as they shall deem proper, not exceeding two hundred dollars for any one offense. * * *"

Section 14 (in part): "Any park district organized under this act shall have power to acquire, lay out, establish, construct and maintain parks and boulevards in said district, and provide boating basins in such parks; and have full power to control, manage and govern the said parks and boulevards, and the use thereof. * * *"

Section 15 (in part): "Said park district shall have power to acquire by gift, grant or purchase, or by condemnation under the act of eminent domain, any and all real estate, lands, riparian estates or rights, and all other property required or needed for any such park or boule-

ward, or for extending, adorning, or maintaining the same, and located within its territory. * * *”

Section 16 (in part): “When any park district created under this act borders upon any navigable body of water, the title to the bed or submerged land of which is vested in the State of Illinois, said district may take possession of, enclose, fill in, reclaim and protect any portion of such submerged land bordering thereon, over which there shall be shoal and shallow water not fit for navigation and shall have the power to establish, construct and maintain parks and boulevards over and upon the same, and all right, title and interest of the State of Illinois in and to the bed or submerged land of such body of water, so taken possession of, enclosed, filled in and reclaimed, is hereby granted and ceded to such park district and the title thereto shall vest in such park district to be held for the use and benefit of the public as a part of said park district for park and boulevard purposes exclusively, and said district shall have power for the purpose of reclaiming such submerged land and protecting the same thereafter, to construct all necessary breakwaters, or protection for the building and maintenance of such parks and boulevards, and the enclosing or reclamation of such submerged lands. * * *”

Section 18. “Whenever any district organized under this act is located along any such navigable body of water as aforesaid, the right is hereby given to the corporate authorities thereof to take charge of, control and police such body of water and the land thereunder for a distance of 300 feet along any park, boulevard or pleasure drive constructed by it and bordering thereon.”

The aforesaid act contains this limitation:

Section 19. “Nothing in this act contained shall be construed as granting to any district the right to interfere with the navigation of any navigable body of water, or to shut off the access to any public dock or landing thereon, or to *shut off the access of public highways or streets* to such body of water at reasonable intervals in each municipality bordering thereon in said district.”

The Legislature of the state has full power and authority to create municipal corporations, such as the park districts above referred to, and within the scope of the powers granted to such park districts as set forth and enumerated in sections 11, 14, 15, 16 and 18 above quoted, I am of the opinion that the park commissioners and the officials of the City of Chicago

do not have concurrent authority, but that the park commissioners have exclusive authority within the scope of powers as above set forth and enumerated.

Whenever any act or series of acts done or attempted by such park boards, fall within the above powers, I am of the opinion that they have full and complete authority to do the same without first obtaining written permission from the City of Chicago.

McCormick v. South Park Commissioners, 150 Ill. 516.

It would seem, however, that from the limitation placed by section 19 of the said act of June 24, 1895, under which the North Shore Park District was organized, to the effect that nothing in said act contained shall be construed as granting to any district the right to interfere with the navigation of any navigable body of water, or to shut off the access of public highways or streets to such body of water at reasonable intervals in each municipality, might be invoked to stop dumping at the foot of Farwell avenue, but the park district would have the right to fill in and reclaim the submerged lands in front of its park bordering on the lake, where the same would not interfere with the access of public highways or streets to a navigable body of water.

The title to the submerged lands under the waters of Lake Michigan was held by the State of Illinois in trust for the people of the entire state, for the purpose of navigation and fishery. In the case of *People v. Kirk*, 162 Ill. 138, it was held that the governmental power of the state over such lands cannot be relinquished, although it might be devoted to a different use, such as for park purposes.

The City of Chicago, under its charter and ordinances, had harbor jurisdiction from the shore for a distance of three miles, but it was competent for the Legislature to provide for the incorporation of park districts and for the transfer of the fee of submerged lands in shoal and shallow waters to such park districts for park purposes. In other words, the Legislature has the power, where lands are held in trust, to change the same from one public use to another public use, within a given area, and also to change the possession and control of

the trust from one municipal corporation to another municipal corporation.

McCormick v. South Park Commissioners, 150 Ill. 516, 523, 525.

West Chicago Park Commissioners v. Chicago, 152 Ill. 392, 406, 407.

City of Chicago v. Carpenter, 201 Ill. 402, 407.

Wilson v. Sanitary District, 133 Ill. 443.

Kentucky v. Louisville, 8 L. R. A. (New series) 553.

People v. Walsh, 96 Ill. 232, 250.

West Chicago Park Commissioners v. McMullen, 134 Ill. 170, 177, 178.

A further act under which similar questions may arise was passed by the Legislature and approved June 4, 1889. It provides as follows:

Section 1. "All right, title and interest of the state in and to the bed of Lake Michigan on which the driveway connected with Lincoln Park is now constructed, or on which any extension thereof may hereafter be constructed, and a strip of submerged land between the shore line thereof and a line fifty feet east of the breakwater protecting said driveway, and any extension of the same, be and is hereby granted to the commissioners of Lincoln Park and their successors in office, to be held for the use and benefit of the public as a part of said park and for no other purposes whatever."

Section 2. "Said commissioners may have and exercise police control over the waters of Lake Michigan along the east side of said driveway and any extension thereof, for a distance of 250 feet, in the same way as over the grounds of the park, and sand may be taken therefrom by permission of said commissioners."

With reference to this act I am likewise of the opinion that the authority of the Commissioners of Lincoln Park is exclusive within the area indicated in said act, and that the City of Chicago has no authority to exact written permits of the Lincoln Park Commissioners to carry out or to do anything as authorized by said act. However, it should be borne in mind that any act or thing attempted to be done by any of the said park boards or municipal bodies, should fall strictly with-

in the scope of power and authority granted to them by the Legislature.

Respectfully submitted,

JAMES G. SKINNER,
Assistant Corporation Counsel.

Approved:

MACLAY HOYNE,
Acting Corporation Counsel.

AUGUST 23, 1912.

MR. WM. D. CASSIDY, Clerk, Municipal Pension Fund.

Dear Sir:

Referring to your communication of August 1, 1912, in reference to the above matter, we beg to state that it is provided in section 1 of the act creating the municipal pension fund, as follows:

“That the provisions of this Act shall not apply to
* * * Nor to laborers unless any such laborer shall within six months after this Act shall be in force and effect, or in the event that any such laborer is *not now in the employ* of such city, village or town, within six months after such laborer *shall enter the service* of such city, village or town give written notice of his election to the Board of Trustees of said fund of his desire to participate in the benefits thereunder.”

On March 28, 1912, this department rendered an opinion construing the Municipal Pension Act and after careful consideration, we came to the conclusion that the words “who are now in the service of such city” are not limited in meaning so as to include only those who are in the *actual* service of such city but are intended to and do apply to all persons who are *entitled* to their positions under the Civil Service law.

We believe that the same conclusion must be reached in this instance so that the words “is not now in the employ of such city” and “shall enter the service of such city” mean respectively, “is not now on the certified list of the Civil Service Commission and eligible to employment” and “shall *originally* enter the service of such city.”

In the case presented for our consideration, viz., Thomas Regan, who was certified by the Civil Service Commission as a

laborer in the department of electricity in 1906, was laid off for lack of work on December 31, 1910, and reinstated on April 13, 1912, notice should have been given to the Board of Trustees of his election to participate in the benefits of the pension fund within six months after the Act went into force and effect, which was July 1, 1911.

Respectfully submitted,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Acting Corporation Counsel.

AUGUST 26, 1912.

HON. HENRY ERICSSON, Commissioner of Buildings.

Dear Sir:

Your sent two letters to this department and spoke to the writer on several occasions concerning the rights of the city in relation to billboards. One letter was under date of June 21, 1912, in which you asked about the necessity for requiring frontage consents for certain billboards to be erected in the neighborhood of 60th and La Salle streets. The other was under date of July 8, 1912, and in this asked that we define your powers in connection with section 707 of the Chicago Code of 1911, which requires frontage consents for billboards.

From the last letter as well as from conversation with you and others connected with the Building Department, we inferred that you were in some doubt as to whether you had the power to enforce the ordinance regulating billboards as they now appear in the Code.

For these reasons we deem it proper to first define the rights of the city in this regard, and then to answer both of your letters in one reply.

A great deal of misapprehension seems to exist in relation to this subject. This is no doubt due to the fact that there has been considerable litigation concerning it. No less than a dozen opinions from this office, involving the subject-matter, have been forwarded to your department within the

last two years. The questions involved probably appear cloudy to you by reason of the fact that at one time two ordinances, and at another time a statute, regulating billboards, were held invalid and unconstitutional.

These decisions do not affect the present ordinances. The ordinances and statute referred to were held invalid because they authorized the exercise of the police powers for purely aesthetic purposes. While the court in each case decided that this was not proper, the opinions of the court do not apply where the ordinances are designed to promote the health, safety, morals or comfort of the public.

The impression also prevails that, through an action started about five years ago, The Gunning System obtained a perpetual injunction against the City of Chicago and its officers which effectually ties their hands for all time. This is a mistaken idea.

In spite of the two decisions of the Supreme Court, and notwithstanding that an injunction did issue in another case, there is nothing which at the present time interferes with the enforcement of the city ordinances in relation to billboards as they now exist.

Two ordinances were enacted by the City Council a number of years ago, both of which were passed on by the Supreme Court in the *City of Chicago v. The Gunning System*, 214 Ill. 628. The first of these ordinances undertook to limit the size and height of billboards, prohibited the erection of same on boulevards and pleasure driveways and in residential districts except upon securing frontage consents, and fixed the license fee at the rate of fifty cents per square foot for each signboard or billboard. The other ordinance prohibited the erection of signboards and billboards within 200 feet of any park, boulevard or driveway, except such signs as were less than three feet square and advertise the sale or renting of the property on which they were located.

The court, in passing on these ordinances, although it held them invalid, went into the question of the rights of the municipality to some extent, and indicated that the municipality had ample power to regulate the construction and maintenance of billboards. In its opinion the court distinctly over-

ruled the view expressed by the Appellate Court in *Gunning v. City*, 114 Ill. App. 377, that it was beyond the power of the City Council to regulate billboards, and said:

"Our conclusion therefore is that the decree of the Superior Court was right and properly affirmed by the Appellate Court, not for want of power in the city council of the City of Chicago to pass an ordinance reasonably regulating the erection and maintenance of billboards, but because, under the allegations of the bill and the proofs made by complainant below, the ordinance here in question is unreasonable." (*City of Chicago v. Gunning*, 214 Ill. 628.)'

Although under the above decision the court recognized the right of the city to regulate billboards, there was more direct authority given under a statute enacted since the decision was rendered.

Since the power of the city, if reasonably exercised, is beyond dispute, it remains to be seen whether either the above decision or the later decision of *Haller Sign Works v. Physical Culture School*, 249 Ill. 436, both of which seem to be constantly relied on as a bar to the proper enforcement of the present ordinances, can be interpreted as holding that you have not the right to enforce the Code in this respect.

The court in the *Gunning* case stated that the question at issue was whether the municipal authorities had reasonably exercised the power vested in them. It held that certain of the provisions in the first ordinance were unreasonable because they applied alike to boards erected in every part of the city, and stated that it was apparent that provisions which were reasonable in one locality are wholly unnecessary and unreasonable in others and in this connection said:

"We do not hold that this ordinance is so unreasonable as to be void if it were limited to particular districts of the city."

Under the present ordinances there is a distinction made between billboards inside of the fire limits and those beyond the fire limits which removes the feature that was objectionable to the court and regarded as unreasonable.

Again, the court in the *Gunning* case held that from the evidence it appeared that the parties complaining would be

required to pay \$210,000 per year as license fees and that this was unreasonable.

This oppressive feature of the former ordinance has also been removed from the present ordinances, and no valid objection can be raised as to the amount of the fees exacted.

Passing next to that part of the first ordinance which required frontage consents in residential districts, the court, in the Gunning case, held that this provision seemed to be an arbitrary restriction on the part of the city depriving an individual property owner of the right to use his property in such manner as he chose, and further stated that there was no evidence in the record upon which to pass on the reasonableness of such a requirement, and that, therefore, under the evidence before the court, the section in question must be held unreasonable and void.

It will be observed that the court does not say that it would have held the section unreasonable if a showing had been made to the effect that the provision was a reasonable one. If such a showing were necessary at present, it could be made. Among other things it could be shown that residential districts are not lighted as well as business districts, and that the presence of billboards furnishes a means of concealment for prowlers and highwaymen. This is only one thing of the many that could be shown to establish the reasonableness of the provision. Aside from this, it is doubtful whether a showing of this character would be necessary at the present time, since the new statute under which the present ordinances were enacted expressly grant to the city the right to control the location of billboards, and therefore the city can exercise that right in just the same way and with just as good effect as in the case of livery stables, garages, hospitals, etc.

The court in the Gunning case further held that the sections of the ordinances in question which undertook to prevent sights that might be offensive to the aesthetic sensibilities of certain individuals residing in or passing through neighborhoods wherein such advertising was displayed, were invalid because:

“The extreme restrictions placed on the erection and

maintenance of such boards, and the licensee fee placed thereon, indicate that these sections were intended to be prohibitive rather than regulative, and are, in our judgment, unreasonable.”

A careful reading of the entire opinion of the court in the Gunning case leaves no doubt as to the position of the court in regard to the matters that have been the subject of dispute from that time to this. The attitude of the court is that the city cannot prohibit the business by oppressive taxation and cannot limit or prevent the display of advertising matter merely on the ground that it is unsightly, but that it has the clear right to pass all reasonable regulative ordinances.

Notwithstanding the perfectly plain expression of the court in the above case, the Legislature in the year 1909 undertook to prohibit the erection of structures of any kind for the purpose of placing advertisements on same within 500 feet of any park or boulevard, the same act requiring the removal of all billboards and advertising signs occupying such space within a year after its passage.

This act was tested in the case of *Haller Sign Works v. Physical Culture Training School*, 249 Ill. 436, and it was held that the statute was unconstitutional for practically the same reasons that the court gave for holding certain sections of the two ordinances referred to above invalid.

Therefore, our Supreme Court is committed, not only by the Gunning case cited above, but also by the recent Haller Sign Works case to the doctrine that the police powers of the state or municipality cannot be lawfully exercised for purely aesthetic purposes unconnected with the safety, health, morals or general welfare of the public.

Courts of other states, notably the Supreme Court of Massachusetts, have held that it is proper for the state or the municipality to exercise its right of eminent domain for the purpose of beautifying a park or boulevard and that they can, under the paramount right of eminent domain, and upon payment of proper compensation, require buildings surrounding a square or facing a boulevard to remain within certain heights, can limit advertising signs, etc. But this right can

be exercised only in the manner in which the right of eminent domain, has always been exercised and does not in any way conflict with the decisions of our Supreme Court as above set forth.

Dillon on Mun. Corp., Fifth Ed., Sec. 697.

Atty. Gen. v. Williams, 174 Mass. 476.

Williams v. Parks, 188 U. S. 491.

From the foregoing you will observe that up to the present time there has not been any decision of our Supreme Court which interferes with a reasonable exercise of the city's police powers in regard to billboards. In fact, as shown above, the Supreme Court indicated that the city had such powers a number of years ago although there was no express grant of power to this effect. Since then the power has been expressly given by the Legislature,

“to license street advertising by means of billboards, signboards and signs, and to regulate the character and control the location of such billboards, signboards and signs upon vacant property and upon buildings.”

Under this express power to license, regulate and control the location of billboards all the ordinances enacted as a part of the Chicago Code of 1911 and now in force relating to same appear to be valid.

City of Rochester v. West, 51 N. Y. St. 482; 53 N. Y. St. 1101; 164 N. Y. 510.

Whitmer-Filbrick Co. v. City of Buffalo, 118 Fed. 773.

Gunning System v. Buffalo, 77 N. Y. S. 987.

St. Louis Gunning Co. v. City of St. Louis, 235 Mo. 99.

City of Passaic v. Patterson B. P. A. & S. P. Co., 71 N. J. Law 75.

There will no doubt be a fierce fight made on the enforcement of section 707 requiring frontage consents, on the theory that limiting the construction of billboards in this way in residential districts is done for purely aesthetic reasons, but, as above stated, we believe it can be shown on a full consideration of the question that there are reasons besides their unsightliness which render billboards objectionable in residential neighborhoods, and that the section in question can be sustained as a valid exercise of the police powers. As for any

other sections relating to billboards in the Code, such a question can not be raised, and we believe that they can all be enforced, including the frontage consent requirement.

It has been stated to the writer by several persons from the building department that notwithstanding the validity of these ordinances, the city is handicapped on account of an injunction which prohibits it from interfering with the signboards and billboards of the Gunning System. This is a mistake. Only one decree was entered in recent years in favor of the Gunning System, and that does not limit your powers so far as the present ordinances are concerned. The decree in question was entered on October 8, 1909, long before these ordinances were enacted, and, in any event, the injunction restrains the city officers only to the extent that is mentioned therein so far as enforcing the old ordinance is concerned. The rights of the city under the present ordinances are not affected by it.

Coming now to the specific questions you ask, we find that in the first letter mentioned above you state that billboards have been erected at three places on South La Salle street between 60th and 61st streets, that they are all erected on the rear of the lots and within 12 feet from the right-of-way of a railroad, and that the advertising side faces the railroad. You also state that at two of these places where there are buildings on the front part of the lot. The question you raise is whether frontage consents will be required where such billboards do not face the street but are on the rear of the lot.

We do not consider the manner in which the billboard faces or its position on the lot as the controlling factor in such a case. We have pointed out above that the ordinance cannot be sustained on the ground that such a structure is unsightly, but because there are other reasons which bring it within the police powers of the municipality. Hence, while it may in a measure be more objectionable to have such a structure on the front of the lot because it disfigures the neighborhood, that alone is not sufficient to make frontage consents necessary, and all other reasons will hold just the same whether the structure is on the front or the rear. The ordinance requires frontage consents in all cases where the block

is a residential one within the meaning of the section in question, and it must therefore be followed out in its literal sense in the same way that similar sections governing other structures are interpreted.

The other letter referred to above has to do with certain billboards which were erected at 4906 and 4909 Michigan avenue, also a residential block. These billboards were erected without securing frontage consents, and you ask whether you have the right to have said billboards removed by the fire department without the city being held liable by the bill posting company.

We are of the opinion that you are authorized under the ordinances to require the removal of these boards by the owners, and, in case they refuse to remove same, you have the right to call on the fire department to tear them down. It seems that you have already given notice to the company which owns these boards that unless frontage consents were secured they would be taken down, but that no attention has been paid to your notice.

Owing to the fact that there has been some doubt as to your powers, we recommend in this case that you inform this company that you are about to act on the advice of the law department before taking such drastic action. If they still ignore your demands, and fail to take any steps toward securing an injunction, it will be proper for you to tear down such billboards.

We trust the above will clear up the situation with regard to your rights and powers under the city ordinances in relation to billboard matters.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Acting Corporation Counsel.

AUGUST 31, 1912.

HON. EUGENE BLOCK, Chairman, Committee on Local Transportation.

Dear Sir:

I have before me for reply the communication of the secretary of your committee requesting an opinion "as to whether the City may locate and construct subways underneath parks and boulevards without obtaining the consent of the park commissioners."

The jurisdiction of the various boards of park commissioners over the parks, parkways and boulevards is derived from the various acts of the General Assembly providing for the location and maintenance of park districts and systems within the City of Chicago.

With the possible exception of street intersections the control of parkways and boulevards by the public authorities is independent of the City of Chicago, exclusive of its authority and to a large extent absolute.

McCormick v. South Park Commissioners, 150 Ill. 516.

West Chicago Park Commissioners v. Chicago, 152 Ill. 392.

In regard to the surface of the parkways at street intersections, the control of these intersections partakes of a joint character.

West Park Commissioners v. City of Chicago, 170 Ill. 618.

In the latter case, wherein the commissioners asserted the power to construct a viaduct in such a way as to cut off certain streets crossing a parkway, the Supreme Court said:

"The streets and boulevard must be regarded as intersecting streets, the former under the control of the city and the latter under the jurisdiction of the park commissioners. By the statute the most comprehensive powers are given to the city over the streets within its domain, and by the Park act the same power and authority over the boulevard are vested in the park commissioners. Each corporation is of equal power and dignity within the limits assigned to it by the law, and each has an equal right within the areas covered by these intersections, which belong to both in common. It would be the height of absurdity to say that at each intersection of a street

with a boulevard the powers of either cease at the line of intersection and begin again when the intersection is passed. It was unquestionably the design of the legislature that a boulevard, when laid out, should be a continuous driveway for pleasure and that the streets crossing it should be continuous highways. It could not be contemplated that either authority could cut off or close up the intersecting way without leave of the other. If the commissioners have the power to shut up these streets and compel the public to go around 250 feet north or 400 feet south over a new crossing, they have a right to shut them up absolutely. The principle is the same in either case, and the existence of such a power cannot be conceded. The jurisdiction, as we think, is concurrent, the commissioners having jurisdiction over the boulevard for all its uses and purposes, and the city having jurisdiction over the intersecting streets, subject to any limitations of use that may arise out of the park acts."

In the case of the construction of a subway under a park or parkway a much stronger case is presented even than one in which the situation involves the intersection of a parkway at grade. The use of the subway for urban transportation is a use for the facilitating of travel and an entirely legitimate use of either the surface of the streets or the portions of the streets beneath the surface so used for subway construction and maintenance. This use of the underground portion of the street, it must be borne in mind, would ordinarily interfere in no way with the use of the parkway or park, as the case may be, for ordinary park or special driveway uses.

The jurisdiction of the parks was vested in the park commissioners for the purpose of providing for the public in general large spaces of ground where the inhabitants of the City might find recreation, fresh air and the landscape adornment, which are the ordinary concomitants of parks, as well as the use of special driveways whereon heavy traffic and teaming in general is excluded for the benefit of pleasure driving. None of these objects or purposes would be in the slightest degree impaired by the construction of subways either under the parkways or the parks themselves.

It has been held in *West Chicago Park Commissioners v. City, supra*, that the park commissioners could not cut off the use of intersecting streets or close them up without the

leave of the city. This opinion dealt with the use of the surface of the streets. *A fortiori* the park authorities could not cut off the right of the City to intersect a park or parkway with a subway which would in no sense interfere with the use of the parkway or park for the objects and purposes for which the same were created and are being maintained.

I am, therefore, of the opinion that the City may locate and construct subways in city streets underneath parks and boulevards without obtaining the consent of the park authorities.

Very truly yours,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

SEPTEMBER 12, 1912.

HON. JOHN E. TRAEGER, Comptroller.

Dear Sir:

Replying to your inquiry of September 7, 1912, whether the city is obliged to pay to the Anti-Cruelty Society all money collected as fines for the violation of city ordinances relating to cruelty to animals or children, imposed in cases dating from September, 1907, to June, 1912, we beg to advise you as follows:

That in section 6, article 5 of the Cities and Villages Act approved April 10, 1872, and in force July 1, 1872, it is provided:

“That all fines and forfeitures for the violation of ordinances, when collected, and all moneys collected for licenses or otherwise, shall be paid into the treasury of the corporation, at such times and in such manner as may be prescribed by ordinance.” (See Hurd’s Revised Statutes, 1909, page 349, section 67.)

On July 1, 1885, an act entitled “An act to provide for the payment of fines paid in money, upon all prosecutions for cruelty to animals or children to the support of societies for the prevention of cruelty to animals and children, or humane societies,” approved June 21, 1885, went into force and effect. Section 2 of said act reads as follows:

“That all fines paid in money imposed through the agency of any humane society (or society for the prevention of cruelty to animals and children) under the laws or ordinances of any city, town or village, within the State of Illinois, may, when collected, be paid into the treasury of such society: Provided, such society named in this act shall be incorporated under any by virtue of the laws of the State of Illinois.” (Hurd’s Revised Statutes, 1909, page 831, section 472.)

To the extent therefore that the fines indicated in the last section quoted *may* be paid into the treasury of any society for the prevention of cruelty, that section of the Cities and Villages Act herein above quoted was modified.

Pursuant to the last section of the statute quoted, the Municipal Code of Chicago, 1905, passed March 20, 1905, contained the following provision (see section 38, page 10):

“All fines, paid in money, imposed through the agency of the Illinois Humane Society, under the ordinance of the city, shall, when collected, be transferred by the city comptroller to the credit of said society, to be applied to its support, and all fines imposed through the act, agency, or prosecution of any special policemen appointed on the application of said society, shall be regarded as imposed through the agency of the Illinois Humane Society.”

That provision of the Municipal Code was in full force and effect until November 8, 1909, when the City Council of the City of Chicago amended the section quoted so as to read as follows (see Council Proceedings 1909-10, page 1654; Municipal Code of Chicago, 1911, section 49, page 12):

“All fines paid in money imposed through the agency of any humane society (or society for the prevention of cruelty to animals and children) under the ordinances of the city, shall, when collected, be transferred by the City Comptroller to the credit of such societies to be applied to their support, and all fines imposed through the act, agency or prosecution of any special policeman appointed on the application of such society shall be regarded imposed through the agency of such society; provided, however, that such society shall be incorporated under and by virtue of the laws of the State of Illinois.”

The claim of the Anti-Cruelty Society to fines imposed can be based only upon the last ordinance quoted.

Inasmuch as the Anti-Cruelty Society is a corporation organized under the laws of the State of Illinois, as appears from the records of the Recorder's Office of Cook County by document No. 3,964,168, we are of the opinion that said society is entitled to be paid all fines imposed through its agency from November 8, 1909. Care must be taken, however, to verify by the court records that the judgment in each case upon which claim is made was procured through the agency of the Anti-Cruelty Society.

Respectfully submitted,

JOS. F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

SEPTEMBER 12, 1912.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

The attached communication from the Grievance Committee of the District of Cook of the Liquor Dealers Protective Association of Illinois, addressed to you and dated April 5, 1912, suggests the passage of an ordinance forbidding the sale of beer in a barrel containing less than thirty-one or thirty-two and one-half gallons of beer.

At your request this department prepared such an ordinance and sent the same to you under date of April 30, 1912.

The Committee calls attention to the alleged practice of certain peddlers who, it is stated, sell whiskey and beer from their wagons in quantities less than one gallon and also do business on primary election and general election days.

The liquor ordinance permits the sale of spirituous, malt, vinous or intoxicating liquor in quantities of less than one gallon only by persons licensed to keep a dramshop and then only at the place named and specifically described in the license (secs. 1525, 1527, 1539 and 1540 of the Chicago Code of 1911). Such sales by wagon peddlers are a violation of the ordinance.

The Committee also complains against the alleged sale of

liquors and beers at retail in packages less than one gallon by department stores, drug stores and wholesale liquor stores on primary election and general election days.

There is no ordinance which deals with the sale of intoxicating liquor on primary election or general election days. Section 64 of the State Primary Election Law (Hurd's R. S. of Ill. of 1911, p. 1092) provides that no spirituous, malt, vinous or intoxicating liquor shall be sold or given away, nor shall any saloon, bar room or place where such liquor is sold or given away, be open during the holding of any primary and fixes a penalty of twenty-five to one hundred dollars for violations of the section.

Section 79 of "An Act in regard to Elections," etc. (Hurd's R. S. of Ill. of 1911, p. 991), provides that no spirituous, malt, vinous or intoxicating liquor shall be sold or given away at retail nor shall any saloon or bar room or place where such liquor is so sold or given away, be open upon any general or special election day within one mile of the place of holding of an election and attaches a penalty of from twenty-five to one hundred dollars for violations of the section.

The effect of the statutory provisions referred to is to forbid the sale of intoxicating liquors at retail on general or special election days or during the holding of any primary election. This rule applies to department stores as well as to dramshops, but does not apply to drug stores selling intoxicating liquor for medicinal, mechanical, sacramental or chemical purposes only under permit issued therefor by the city. Wholesale liquor stores having no dramshop license and wagon peddlers cannot legally sell at retail either on election or primary election days or any other time.

We return herewith the said communication of April 5, 1912.

Yours respectfully,

BRYAN Y. CRAIG,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

SEPTEMBER 12, 1912.

HON. JAMES S. MCINERNEY, Prosecuting Attorney.

Dear Sir:

We are in receipt of your communication requesting an opinion as to what constitutes vinous or malt liquors within the meaning of the ordinance.

Vinous liquor is a liquor made from the fermented juice of the grape.

Feldman v. City of Morrison, 1 Ill. App. 460.

Allred v. State, 89 Ala. 112.

23 Cyc. 60.

Black on Intoxicating Liquors, Sec. 5.

Woolen & T. on Intoxicating Liquors, Sec. 26.

The term malt liquors was defined in the case of *Allred v. State*, *supra*, as follows:

“The term ‘malt liquors’ embraces porter, ale, beer, and the like, which are the result or product of a process by which grain—usually barley—is steeped in water to the point of germination, the starch of the grain being thus converted into saccharine matter, which is kiln-dried, then mixed with hops, and, by a further process of brewing, made into a beverage.”

The foregoing definition of malt liquors is adopted in Block on Intoxicating Liquors at section 6 and in Woollen & Thornton on Intoxicating Liquors at section 32.

Malt liquor is defined in the Century Dictionary as follows:

“Malt Liquor—a general term for an alcoholic beverage produced merely by the fermentation of malt, as opposed to those obtained by distillation of malt or mash.”

The definition last given is quoted with apparent approval in the case of *Sarlls v. U. S.*, 152 U. S. 570.

Malt liquor is defined in Webster's International Dictionary as

“an alcoholic liquor, as beer, ale, porter, etc., prepared by fermenting an infusion of malt.”

In the case of *Adler v. State*, 55 Ala. 16, where the question as to what constituted malt liquor was a material inquiry, the court justified a reading in evidence of the definition of

the term malt-liquor as furnished in Webster's Unabridged Dictionary.

Whether a given liquor is either a vinous liquor or a malt liquor is a question of fact to be proved by evidence.

Hansberg v. People, 120 Ill. 21.

Black on Intoxicating Liquors, sec. 6.

Under the dramshop act (chap. 43, R. S. of Ill.) as well as under the liquor ordinance (Chicago Code of 1911, chap. XLII), it is sufficient to prove that a defendant sold spirituous, vinous or malt liquor without proving their intoxicating quality, but as to other liquors it must be proved, as a question of fact, that they are intoxicating.

Hewitt v. People, 186 Ill. 336.

In regard to the inquiry in Mr. J. C. Carlson's letter to you, which accompanied your communication, in respect to the "juice or wine" made by Mr. Chavdaroff, which it is said contained "something like 5½% of alcohol," we are of the opinion that if the liquor is the fermented juice of the grape it would be a vinous liquor and its sale without a license would be a violation of the statute and ordinance irrespective of whether it is intoxicating. If the liquor is not a vinous liquor, as above defined, and it should be shown (as we believe could be done) that it will produce intoxication when imbibed in such quantities as it is practically possible for a man to drink, it would be classed as an intoxicating liquor and its sale without a license would be a violation of the statute and ordinance.

We return herewith the letter of Mr. J. C. Carlson, to yourself.

Yours truly,

BRYAN Y. CRAIG,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

SEPTEMBER 12, 1912.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

We have your communications of May 22 and June 21, 1912, relative to claims made by the Pennsylvania Railroad Company on account of expenditures made by it in repairing the Twelfth and Eighteenth street viaducts.

We are of the opinion that the claims of the railroad company are not well founded.

We are familiar with the ordinances on which it bases its claims, and while those ordinances on the face thereof warrant the contention made by the railroad company we are of the opinion that by said ordinances the City attempts to contract away its police power, which it is without authority to do, and that, in so far as the ordinances in question form the basis for the railroad company's claims, they are agreements which, in effect, contract away the City's police power, and to that extent are void, and therefore cannot constitute the basis for the company's claims.

This precise question has not been before the Supreme Court in this state, although it has announced the general principle above referred to, but the identical question has been before the Supreme Court of the United States in *Northern Pacific Railway v. State of Minnesota*, 208 U. S. 583. In that case at page 596 the court says:

“It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process, or of the equal protection of the laws, by the States, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulations in particulars essential to the preservation of the community from injury. *Beer Co. v. Massachusetts*, 97 U. S. 25; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Barbier v. Connolly*, 113 U. S. 27; *New Orleans Gas Company v. Louisiana Light Company*, 115 U. S. 650; *Mugler v. Kansas*, 123 U. S. 623; *Budd v. New York*, 143 U. S. 517.’

The principle was recognized and enforced in *Chicago, Burlington & Quincy R. R. Co. v. Chicago*, 166 U. S. 226, where it was held that the expenses incurred by the railroad company in erecting gates, planking at crossings, etc., and the maintenance thereof, in order that the road might be safely operated, must be deemed to have been taken into account when the company accepted its franchise from the State, and the expenses incurred by the railroad company, though upon new streets, might be required as essential to the public safety. In *Detroit Railroad Co. v. Osborne*, 189 U. S. 383, it was held that the State of Michigan might compel a street railroad to install safety appliances at an expense to be divided with a steam railroad company occupying the same street, notwithstanding the steam railroad was the junior occupier of the street. The subject was further under consideration in *New Orleans Gas Light Co. v. Drainage Commission of New Orleans*, 197 U. S. 453, where it was held, that although the gas company had permission from the city to lay its pipes under the streets, it might be required to remove the same at its own expense, in the exercise of the police power in the interest of the public, in order to make way for a system of drainage which was required, in the interest of the public health, without compensation to the gas company; and that uncompensated obedience to regulations for public safety under the police power of the State was not a taking of property without due process of law.

The same principles were recognized and the previous cases cited in *Chicago, Burlington & Quincy Ry. Co. v. People of the State of Illinois ex rel. Drainage Commissioners*, 200 U. S. 561, and again in *Union Bridge Co. v. United States*, 204 U. S. 364. The result of these cases is to establish the doctrine of this court to be that the exercise of the police power in the interest of public health and safety is to be maintained unhampered by contracts in private interests, and that uncompensated obedience to laws passed in its exercise is not violative of property rights protected by the Federal Constitution.

In this case the Supreme Court of Minnesota has held that the charter of the company, as well as the common law, required the railroad, as to existing and future streets, to maintain them in safety, and to hold its charter rights subject to the exercise of the legislative power in this behalf, and that any contract which undertook to limit the exercise of this right was without consideration, against public policy and void. This doctrine is entirely

consistent with the principles decided in the cases referred to in this court. But it is alleged that at the time this contract was made with the railroad company it was at least doubtful as to what the rights of the parties were, and that the contract was a legitimate compromise between the parties, which ought to be carried out. But the exercise of the police power cannot be limited by contract for reasons of public policy, nor can it be destroyed by compromise, and it is immaterial upon what consideration the contracts rest, as it is beyond the authority of the State or the municipality to abrogate this power so necessary to the public safety. *Chicago, Burlington & Quincy R. R. Co. v. Nebraska ex rel. Omaha*, 170 U. S. 57."

We, therefore, advise you that payment of these claims should be declined.

Very truly yours,

CHAS. M. HAFT,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

SEPTEMBER 14, 1912.

TO THE HONORABLE, THE COMMITTEE ON JUDICIARY, STATE
LEGISLATURE, ELECTION AND RULES OF THE CITY COUNCIL.
Gentlemen:

Your committee has referred to this department the following order of the City Council:

"Ordered, that the Committee on State Legislation be and it is hereby directed to prepare at its earliest convenience, and to submit to the first meeting of the General Assembly at which it is proper to introduce such a measure, a Bill giving the City Council of the City of Chicago the power to license, supervise and regulate private banks and bankers as well as the business of transmitting money to foreign countries."

Replying thereto we beg to advise you that no new legislation is necessary to confer the power you request. Sec. 91 of the Cities, Villages and Towns Act gives the City Council power

"To tax, license and regulate auctioneers, distillers,

breweries, lumber-yards, livery stables, public scales, money changers and brokers.”

In *Hinckley v. Belleville*, 43 Ill. 183, the Supreme Court construed the word “money changer” to mean banker as we ordinarily understand that word. The court further held that under the above mentioned section the City Council may pass an ordinance taxing, licensing or regulating bankers. Private bankers are included in this description.

Should you desire any ordinance upon this subject the writer will be pleased to co-operate with you.

Very respectfully,

GEO. L. REKER,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

SEPTEMBER 16, 1912.

HON. EDWARD COHEN, City Collector.

Dear Sir:

We are in receipt of your communication of August 23d requesting an opinion (1) as to whether license fees should be exacted for the operation of billiard or pool tables in *bona fide* clubs and such institutions as the Y. M. C. A., where a regular charge is made for the use of such tables, but their use is limited to the members of the organization; and (2) whether the Y. M. C. A. should be charged a license fee for operating a restaurant catering to its members only.

First: As to the license for billiard and pool tables:

Section 167 of the Chicago Code of 1911 in regard to licensing billiard and pool tables, provides that:

“No person shall have, keep or conduct for profit within the city any billiard or pool table, bowling or pin and ball alley, without first obtaining a license therefor as hereinafter provided. * * *”

It will be observed that the ordinance refers only to persons having, keeping or conducting *for profit*, any billiard or pool table. We assume that when you speak of “*bona fide* clubs” you refer to clubs organized in good faith for pur-

poses of social pleasure, recreation and the like. Where such clubs maintain one or more billiard or pool tables they are for the exclusive use of members and their guests and the use of the tables is merely incidental to the main purpose of the club. Members are usually charged for the use of the tables, but generally the charge is no more than is necessary to pay for the service and the maintenance of the tables.

Such clubs are commonly organized under the general incorporation laws of the State of Illinois as corporations not for pecuniary profit and the statute relative to such corporations provides that no dividend or distribution of the property of such corporation or association shall be made until all the debts are fully paid and then only upon its final dissolution and surrender of organization and name. Such clubs generally derive their chief revenue from initiation fees and dues of members.

Our courts have held that where a club sells liquors to its members the club must take out a dramshop license.

People v. Law and Order Club, 203 Ill. 127.

South Shore Club v. People, 228 Ill. 75.

The statute forbids the sale of intoxicating liquors at retail without a dramshop license, irrespective of the question as to whether the sale is for profit.

In the case of *South Shore Club v. People*, *supra*, the court in its opinion on page 86 said:

“The fact that there is no profit in a sale does not deprive the transaction of its character as a sale.”

On the other hand, as above pointed out, the ordinance in respect to billiard and pool tables expressly limits the license requirements to persons keeping such tables *for profit*.

We are of the opinion that the ordinance requiring persons keeping for profit any billiard or pool table does not apply to clubs of the character above mentioned and operated under the conditions above stated.

Second: As to whether the Y. M. C. A. should be charged a license fee for operating an eating place for its members only:

Section 1312 of the Chicago Code of 1911 is as follows:

“No person, firm or corporation shall exercise with-

in the City of Chicago the business of keeping a restaurant without first procuring a license as hereinafter required and paying therefor a fee of fifteen dollars per annum."

The code does not define the word "restaurant" nor does that term have a definite legal meaning.

In the case of *Lewis v. Hitchcock*, 10 Fed. 4, the court speaking of the term "restaurant" held that:

"As currently understood it doubtless means only and chiefly an eating house."

In Webster's Dictionary the term "restaurant" is defined as "an eating house" and the same authority defines "an eating house" as "a house where cooked provisions are sold, to be eaten on the premises."

Webster's definition of a restaurant and an eating house was cited and adopted in the case of *Cecil v. Green*, 60 Ill. App. 61.

Cyc. (Vol. 34, p. 1677) gives the following definition of a restaurant:

"*Restaurant.* An establishment for the sale of refreshments both food and drink; a place for refreshment; a house where liquors and cooked food are sold; an eating house; an *eating house*; a place where something to eat, ready prepared or which can be readily prepared, may be obtained; an *eating house*; a place where eatables can be obtained at all reasonable hours."

The City of Louisville defined a restaurant by ordinance as follows:

"Every place where food or refreshments of any kind—not including spirituous, vinous or malt liquors—are prepared for casual visitors, and sold for consumption therein, shall be deemed a restaurant or eating house."

See *New Galt House Co. v. Louisville*, 17 L. R. A. (N. S.) 566.

It would appear that the readiness to serve the public generally is a characteristic of a restaurant.

We are of the opinion that the Y. M. C. A. which as a matter of convenience to its members and as merely incidental to its main purpose furnishes meals or food to its members exclusively and not to the general public, is not thereby

exercising the business of keeping a restaurant within the meaning and intent of the ordinance and cannot be required to take out a restaurant license.

Yours respectfully,

BYRON Y. CRAIG,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

SEPTEMBER 17, 1912.

WILLIAM D. CASSIDY, Esq., Clerk Municipal Pension Fund,
Chicago.

Dear Sir:

In reply to your communication of September 12, 1912, in reference to the above matter, we beg to advise you that section 1 of the Act of 1911, creating the municipal pension fund, after providing that a pension fund shall be established and maintained for municipal employes who are employed by the city under and by virtue of the Civil Service Act and for those who were appointed prior to the passage of said Act, reads:

“Provided, however, that the provisions of this Act shall not apply to * * * Nor to laborers unless any such laborer shall within six months after this Act shall be in force and effect, or in the event that any such laborer is not now in the employ of such city, village or town, within six months after such laborer shall enter the service of such city, village or town, give written notice of his election to the Board of Trustees of said fund of his desire to participate in the benefits hereunder.

“Said fund shall consist of amounts of two dollars a month retained or deducted by the comptroller of such city, village or town from the salaries or wages of each employe. * * *”

When Mr. Bakosh gave his written notice to the Board of Trustees of the Municipal Pension Fund of his desire to participate in the benefits of the Act, he became *ipso facto* one of the employes to whom the Act is applicable.

The provision hereinabove quoted that the fund shall consist of amounts of two dollars a month retained or deducted

by the comptroller of the city, etc., from the salaries or wages of each employe, is mandatory and applies to each employe who is a beneficiary of the fund.

The fact that the comptroller through inadvertence did not deduct and retain the statutory amount from the wages of Mr. Bakosh since he gave written notice of his election to become a beneficiary of the pension fund, can have no bearing upon the effectiveness of the Act. There is no provision anywhere in the Pension Act permitting an employe to withdraw from the benefits thereof.

Respectfully submitted,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

SEPTEMBER 17, 1912.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

Replying to your communication dated June 5, 1912, asking this department for advice as to what obligation rests on the Suburban Railroad Company under its ordinance, affecting the improvement on 52d avenue from Madison street to the Chicago & Northwestern Railway Company's right of way, we beg to state as follows:

In an ordinance of July 19, 1895, passed by the Town of Cicero, the Suburban Electric Railroad Company (now the Suburban Railroad Company) was granted the right to lay a single track on the east eight (8) feet of the west one-half ($\frac{1}{2}$) of Robinson avenue (now 52d avenue) from the center line of Madison street to the south line of the Chicago & Northwestern Railway Company right of way. This ordinance also contained a provision that the tracks of the company shall not be elevated above the surface of the street where laid and that the track should be laid in such a manner that carriages and other vehicles can easily and freely cross the same at all points without obstruction." The company also agreed to "pave with wooden blocks the center of said

street between the outside rails of said tracks;" also to "pave one (1) foot outside and adjoining all outside rails when any such street is improved in conformity with such improvement."

While this ordinance does not contain any provision that the company shall continue to keep and maintain its right of way in repair, yet this obligation rests upon the company even independent of any express stipulation to this effect.

Nellis on Street Railways, Section 161.

Booth on Street Railways, Section 243.

Railway Company v. State, 87 Tenn. 746.

A later ordinance of the Town of Cicero to the Suburban Railroad Company dated February 18, 1898, granted the right "to maintain and operate a railroad track upon the ten (10) feet west and adjoining the center line of said Robinson avenue from the center line of Madison street to the south line of the right of way of the Chicago & Northwestern Railway Company." This ordinance also contains a provision that the company "shall forever keep and maintain in proper repair and condition, the ten (10) feet occupied by its railroad track in said Robinson avenue."

On December 20, 1897, an ordinance was passed by the City of Chicago granting to the Suburban Railroad Company the right to lay one track on the east one-half ($\frac{1}{2}$) of Robinson avenue from Madison street north to the south line of the right of way of the Chicago & Northwestern Railway Company. This track was to be laid upon the "ten (10) feet east of and adjoining the center line of Robinson avenue" and the company agreed to "forever keep and maintain in proper repair and condition the space occupied by its railroad track in said Robinson avenue from outer rail to outer rail."

You will observe, therefore, that the Suburban Railroad Company is obligated by express agreement to keep and maintain in repair the ten (10) feet on the west one-half ($\frac{1}{2}$) of the street as well as the space between the tracks on the east one-half ($\frac{1}{2}$) of the street. These repairs should be maintained the entire distance from the center line of Madison street to the right of way of the Chicago & Northwestern Railway.

We have in this letter answered the specific question con-

tained in your communication. This letter should be considered, however, in connection with our letter of September 18, 1912, addressed to you, where we discuss the obligations of the Suburban Railroad Company with respect to Harrison street between 48th avenue and 60th avenue and on 52d avenue between West Lake street and West 12th street at much greater length.

Respectfully submitted,
 MAX M. KORSHAK,
Assistant Corporation Counsel.

Approved:
 WM. H. SEXTON,
Corporation Counsel.

SEPTEMBER 18, 1912.

HON. LAWRENCE E. MCGANN, Commissioner of Public Works.

Dear Sir:

Your letter of July 2, 1912, in which you state that at its meeting of July 1, 1912, the city council passed an order directing the Commissioner of Public Works to secure the opinion and advice of the Corporation Counsel as to the legality of the obstructions (unused rails and ties) on West Harrison street, between South 48th avenue and South 60th avenue and on 52d avenue between West Lake street and West 12th street and to act in accordance with that opinion in the matter of removing said obstructions, has been referred to me, for reply.

In your letter you ask us to advise you in accordance with said council order as to the legality of said obstructions.

The right to operate on Harrison street and on 52d avenue is derived originally through ordinances of the Town of Cicero to the Suburban Railroad dated July 19, 1895. On July 30, 1902, the Chicago Title and Trust Company filed its bill of foreclosure in the Circuit Court of Cook County (General No. 22931, Term No. 168) against the Suburban Railroad Company. This suit is still pending and the company's property is in the hands of a receiver, Emil G. Schmidt, president of the County Traction Company, being the present receiver.

The Suburban Railroad Company was incorporated on May 8, 1895, under the General Railroad and Warehouse Act, entitled "An Act to provide for the incorporation of associations that may be organized for the purpose of constructing railways, maintaining and operating same * * * (approved and in force March 1, 1872). This act limited the life of corporations for a period of fifty years. The company secured ordinance grants from the villages of La Grange, Grossdale, Riverside, Proviso and Cicero for periods ranging from twenty to fifty years, the grant by the Town of Cicero being for a period of fifty years. The company also acquired in November, 1896, a fifty-year lease of the Chicago, Harlem and Batavia Railroad and of the Chicago and South Western Railroad, both of which were steam dummy railroad lines.

At the time the Suburban Railroad Company secured its grants on Harrison street and on 52d avenue (July 19, 1895), the Horse and Dummy Act, entitled "An Act in regard to horse and dummy railroads, approved March 19, 1874," was in force; this act specifically limiting the time for which grants might be made to street railroads, by any town, village or city, to *twenty years*, and the question is raised as to the validity of a *fifty-year* grant by the town of Cicero to the Suburban Railroad when the statute in force expressly limited the life of a grant to street railroads to a period of twenty years.

While it is true that a municipality would have no power to make a grant for a period longer than twenty years to a *street railroad*, organized under the Horse and Dummy Act, yet there is nothing which prohibits a municipality from making a grant for a period longer than twenty years to a *railroad* organized under the Railroad and Warehouse Act.

(Clause 5, Section 20, page 1136, Rev. Stat., 1889.)

The question arises therefore as to whether the Suburban Railroad is a *street railroad* or a *commercial railroad* since it has been held that the same corporation cannot be both a street railroad corporation and a commercial railroad corporation.

Bradley Mfg. Co. v. Traction Co., 229 Ill. 176.

Chicago & Southern Traction Co. v. Flaherty, 222 Ill. 67.

Citing:

Gillette v. Aurora Railways Co., 228 Ill. 261.

Dillon on Mun. Corp., Sec. 1258, Vol. III.

Aurora v. E. A. & S., 227 Ill. 485.

In *Gillette v. Aurora Railways Co.*, *supra*, the court held that the fact that a railroad is not allowed to carry freight and is obliged to stop at corners in a municipality does not deprive it of its character as a railroad.

In the case of *Hannah v. Street Ry. Co.*, 81 Mo. 83, the court said:

“The road in question is quite a different thing from that described. It is not used to carry passengers from corner to corner or from one section or portion of a city to another or to transport persons from down town to and from the suburbs; it pays little attention to streets and roads but takes its course through the country just as any other railroad. It is a means of transporting persons from one city to another * * *. It is rural rather than urban * * *.”

The defendant's predecessor was then clearly a railroad corporation as provided for, regulated and named in our statute governing railroads and it constructed, maintained and operated a railroad within the meaning of that statute * * *.

That defendant has changed the motive power from steam to electricity can make no difference. It still remains a railroad within the meaning of the act. (Booth on St. Rys., Sec. 1 and notes.)”

Whether a road is a railroad does not depend upon its motive power (33 Cyc. 35) and it has been held that where a corporation is organized under the railroad act of Illinois, the fact that it is operated by electricity or that it exercises the function of a street railway in “cities and villages does not abridge its powers or take the corporation out of the general railroad statute,” and that such a corporation may operate a *steam, elevated, electric* or any kind of a railway.

Lieberman v. Chicago Rapid Transit Co., 141 Ill. 140.

Malott v. Collinsville C. & E. St. L. Electric R. Co., 108 Fed. 313.

In the last case the court said:

“We cannot conceive that these acts so far at least as they are reasonably applicable, were not meant to cover every form of railroad that, in the march of events, answers the purposes of general transportation. Nor does their incidental function as street railways in towns or cities traversed lift them out of the railroad statutes.”

It would seem from the foregoing that while the Suburban Railroad Company possesses many of the characteristics of a *street railroad*, yet this fact does not take it out of the classification of *commercial railroads*, and that a grant by the Town of Cicero for a period of fifty years to the Suburban Railroad is not inconsistent with the statute which limits grants to *street railroad corporations* to a period of twenty years.

If there is any question about the fifty year grant, however, it would seem that this has been removed by the passage of an amendment by the Town of Cicero, substituting a new granting section on June 29, 1897, at which time the Allen law was in force, authorizing fifty-year grants to street railroads (the Allen law having been approved on June 9, 1897, and repealed by act of March 7, 1889).

Section 2 of the ordinance of July 19, 1895, provides that rails shall not be laid above the surface of the street and that the company shall pave with wooden blocks the center of streets between outside rails; also shall pave one foot outside and adjoining all outside rails when any street is improved in conformity with such improvement. Until the streets are improved the rails should be protected with planks laid lengthwise and the company agreed to sprinkle the right of way whenever necessary.

Under Section 2 of the ordinance of June 29, 1897, the company obligated itself to pave with wooden blocks the east 25 feet of the west half of Robinson avenue (now 52d avenue) between Madison street and the right of way of the C. & N. W. R. R. Co. and to place a stone curb in the street.

The foregoing conditions were re-enacted in the ordinance of the Town of Cicero dated February 18, 1898, and in addition the company obligated itself to “forever keep and maintain in repair and condition the 10 feet occupied by its rail-

road track in said Robinson avenue (from Madison to right of way of C. & N. W. R. R.).

On December 20, 1897, an ordinance was passed by the City of Chicago granting track rights to the company on the east half of Robinson avenue between Madison street and the right of way of the C. & N. W. R. R.

Section 2 of this ordinance provides that the tracks shall not be elevated above the surface of the street and shall be laid on the ten feet east of the center line of Robinson avenue. The company also agreed to pave the entire east half of the roadway with cedar block pavement and place a curb in the street; in addition the company obligated itself to "forever keep and maintain in proper repair the space occupied by its railroad track from outer rail to outer rail."

In addition to the foregoing obligations there are others of more or less importance and it is impossible for us to determine without additional investigation which of the ordinance obligations have and which have not been violated. From personal investigation we do know that the company is not maintaining its right of way on Robinson avenue (now 52d avenue), between Madison and the right of way of the C. & N. W. R. R., in proper repair, which is direct violation of the ordinance requirements; nor is it keeping its right of way on 52d avenue between Madison and 12th street and on Harrison street between 48th avenue and 60th avenue in proper repair, which obligation rests upon the company independent of ordinance requirements.

Nellis on Street Railways, Sec. 161.

Booth on Street Railways, Sec. 243. (Citing a large number of authorities.)

There is no provision in either the Cicero or the Chicago ordinances stating what effect the default on the part of the company in complying with its ordinance requirements shall have upon the grants; nor do any of the ordinances define the rights of either of the Town of Cicero or the City of Chicago in case of such default except that in the event the company shall fail to comply with the *paving* obligations, then the Town of Cicero or the City of Chicago "may make

such improvements and charge the expense thereof to the company.”

Section 2, Cicero Ordinance, July 19, 1895.

Section 3, Cicero Ordinance, February 18, 1898.

Section 2, Chicago Ordinance, December 20, 1897.

In our opinion the city would not be confined to this remedy only, since the right of the city to make repairs upon failure of the company to do so and charge such repairs to the company exists even without an express provision to this effect.

36 Cyc. 1412.

Elliot on Street Railroads, 1092-1096.

27 Am. & Eng. Encyc. of Law and Procedure 44.

While it is true that in grants giving a city the right to dissolve a contract upon failure to comply with conditions subsequent, a city upon non-fulfillment of specified conditions may terminate a grant at its election even without a judicial determination of the breach, yet where a term of an agreement is broken and there is *no* agreement that the breach thereof shall operate as a termination of the contract, a city has no right to declare a forfeiture without a judicial determination of the breach.

3 Am. & Eng. Encyc. of Law 983.

Bellville v. Citizens Horse Ry. Co., 152 Ill. 187.

The rule of law is that when an ordinance granting rights to a street railway company which contains no provisions for a forfeiture by the city has been accepted by the company the rights thereby conferred become vested and can only be declared forfeited by a court of competent jurisdiction in a suit brought for that purpose (*Nellis on St. Railways*, Section 72); and in such case an ordinance passed by a city council declaring the rights granted void and forfeited, is alone of no force or effect.

Spencer v. City of Palestine, 116 S. W. 857.

City of Alexandria v. Morgan Louisiana & T. R. & S. S. Co., 109 La. 58.

In the later case the court said:

“The municipal officials were without authority to adjudge that there had been a breach by the railroad

company of the conditions of its franchises and contract with the city. Certainly so when the ordinance granting the rights claimed by the company did not stipulate such power or reserve it to the municipality * * *. The City of Alexandria might institute a suit to forfeit for failure of compliance with the conditions of the grant; but could not itself sit in judgment in a case when it is complainant and enter up judgment against the grantee." See also:

Booth on St. Railways, Sec. 49.

Akron, Bedford & Cleveland Railroad Co. v. Village of Bedford, 6 Ohio N. P. 276.

In *Easton Pass Ry. Co. v. Easton*, 133 Pa. 531, the court uses the following apt language in a case where the city under an ordinance containing no right to terminate the grant on non-compliance of conditions, proceeded to tear up tracks, without previous judicial determination:

"They (city officials) were merely trespassers and rioters and liable civilly and criminally as such * * *. The officers of a municipality from the mayor to the police officers are as much bound by the law as a private citizen, and have no license to transgress the law in the enforcement of the law."

We have been able to find some cases where the action of the city in terminating by ordinance a grant containing no reservation giving the city this right has been sustained (*Farmers' Loan & Trust Co. v. Galesburg*, 133 U. S. 156); but these cases are very few and the violations have been of a grave and important nature. However, the weight of authority is the other way, and especially so where non-compliance has been acquiesced in for a number of years and there is no showing that notice has been served upon the company specifying instances of non-compliance, the courts holding that a municipality has the undoubted right to waive such acts of non-compliance.

Wheeling & E. G. R. Co. v. Tridelphia, 4 L. R. A. 334.

New series—citing:

Kneeland v. Gilman, 24 Wis. 39.

Martel v. East St. Louis, 94 Ill. 67.

Chicago R. I. & P. R. R. Co. v. Joliet, 79 Ill. 39.

In view of the fact that the Suburban Railroad has been

in the hands of a receiver for the past ten years, and there is some question as to whether a wilful intent to disregard the ordinance obligations can be shown, and in view of the further fact that official notice has not been given to the company (as far as we know) specifying the instances of non-compliance with the ordinances, it is our opinion that before proceedings be taken by the city to forfeit the rights of the company under the Cicero and Chicago ordinances that you serve notice upon the company setting out the instances of non-compliance giving the company a reasonable time within which to make good its defaults.

If the company then still persists in its refusal to comply with the ordinance requirements then court proceedings should be instituted to forfeit the rights of the company under its respective ordinances; and at the same time proceedings may be instituted for indicting the Suburban Railroad Company and its receiver for maintaining a nuisance, the courts holding that a street railroad may become a nuisance by reason of failure to keep its tracks and roadbed in repair, thereby obstructing travel.

36 Cyc. 1428.

Elliot on St. Railroads, 1096.

Railway Co. v. State, 87 Tenn. 746.

And this last proceeding will lie even though the property of the company is in the hands of a receiver. (*Railway Co. v. State*, 87 Tenn., *supra*).

In the meantime, since it is desirable to pave 52d avenue between Madison and Lake streets, you have the right under Section 2149 of the Chicago Code of 1911 to give the company thirty days notice to remove the old style rail and replace same with modern grooved rails. Such notice should at once be given to the company.

We would likewise call your attention to the provisions of Section 2150, under which—

“Every person or corporation operating a street railroad in the city shall keep the tracks of his or its road in such condition that such tracks shall not at any time be elevated above the surface of the streets on which they are laid and so that vehicles can easily and freely at all times cross such tracks at all points in any

direction without obstruction; they shall also keep in good repair such portions of the streets as they severally have agreed or may agree with said city to keep in repair."

Section 2152 provides for notice and Section 2153 provides for prosecution and penalty, upon failure to comply.

Respectfully submitted,

JOHN W. BECKWITH,

MAX M. KORSHAK,

Assistants Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

SEPTEMBER 18, 1912.

EUGENE BLOCK, Esq., Chairman, Committee on Local Transportation.

Dear Sir:

I have before me a request for an opinion as to the duty of the Board of Supervising Engineers to give information "as to the daily passengers carried on each line of the Chicago Railways Company and the Chicago City Railway Company and the earnings therefrom in each case."

It appears from correspondence attached to your communication that you requested on August 29th a statement of the character mentioned from the board, to which request the board replied through the member representing the City of Chicago that "specific information such as you request should be given out only upon request of the principles, namely, the Mayor of the City of Chicago and the president of the Street Railway Company interested." This raises the question as to whether the board is under any obligation to furnish your committee with this information or whether it should furnish such a statement only to the Mayor. There are no express provisions in the several ordinances of 1907 imposing any obligation upon the board of supervising engineers to furnish information at the request of the Local Transportation Committee. In fact the idea contained in the ordinance in this respect is, it would seem, that the duty of furnishing information to city officials devolved upon the company to

furnish the executives of the city with information rather than the legislative body.

Section 29 of the ordinance of the Chicago City Railway Company of 1907 (the Chicago Railways Company provisions being similar) is:

“That the company shall prepare and file with the City Comptroller annual reports in writing, setting out the amount of the business done by the company for each year and the expense of conducting said business.”

“The City Comptroller or accountants authorized by him under the direction of the Mayor, shall have the right at all reasonable times to examine all the books and records of the company for the purpose of ascertaining the accuracy of such reports.”

Invoking the well known canon of statutory construction that the expression of certain subjects is by implication the exclusion of others it would seem that by providing that reports as to the amount of business done and expenses incurred by the companies should be made to the Comptroller must exclude any obligation to make reports to any other persons or bodies.

I therefore come to the conclusion that the proper person to obtain the information concerning daily passengers carried and the earnings therefrom is the City Comptroller or accountants authorized by him under the direction of the Mayor.

I, however, call attention to the duties of the Local Transportation Expert in the premises. Section 35 of the ordinances (Chicago City Railway Company) provides that:

“The said City Council may vest any or all matters of administration under this ordinance including such thereof as herein invested in the Mayor, Comptroller or other officials * * * in a department or bureau of local transportation or in its City Engineer, or in any city official or employe.”

Certain administrative matters have, in accordance with the foregoing section, been vested in a department. Section 2137 of the Chicago Code of 1911 provides that there shall

“be established an executive department which shall be known as the department of local transportation.”

The head of this department is the Local Transportation Expert.

In regard to the duties of this official, Section 2142 provides that:

“It shall also be the duty of the Local Transportation Expert * * * to investigate and keep himself and the Committee on Local Transportation informed as to the kind, quality and sufficiency of the service furnished by the company engaged in the business of local transportation in the city and as to the needs of the improvement of the service and the best means of bringing about such an improvement.

It shall also be the duty of the Local Transportation Expert to make special investigations or to *procure for the City Council or the Committee on Local Transportation special information relating to the subject of transportation as may be ordered by the City Council or said committee.*”

It thus appears that the duty of furnishing information to the City Council is cast upon the Local Transportation Expert rather than upon the Board of Supervising Engineers or any of its members and it further appears that the obligation to furnish the information as to the number of passengers carried and the revenue therefrom rests upon the company to furnish such information to the Comptroller and that a verification of such report can be made by that official or his deputies.

Yours respectfully,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

SEPTEMBER 18, 1912.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

We are in receipt of your communication of August 2d, transmitting copy of a communication from the Chicago Tunnel Company to you dated July 31, 1912, requesting that you honor requests for permits by chief engineer of the Chicago

Tunnel or of the Illinois Telephone and Telegraph Company for permits of the City of Chicago to do construction work.

You asked to be advised whether in future dealings with the Illinois Tunnel Company you shall recognize the Chicago Tunnel Company as its successor and the Illinois Telephone and Telegraph Company as its agent and the Chicago Warehouse and Terminal Company as a contractor.

The first ordinance granted to the Illinois Telephone and Telegraph Company, the predecessor of the Illinois Tunnel Company and the Chicago Tunnel Company, was passed by the City Council February 20, 1899 (C. P., p. 1692). Section 1 of that ordinance grants permission and authority "to the Illinois Telephone and Telegraph Company, its assigns and lessees to construct, maintain, repair and operate," etc.

On July 15, 1903, another ordinance was passed (C. P., p. 914) granting permission and authority "to the Illinois Telephone and Telegraph Company, its successors and assigns, to construct, maintain, repair and operate," etc.

It appears that on or about January 18, 1904, the Illinois Telephone and Telegraph Company assigned its property, franchises and ordinance rights to the Illinois Tunnel Company.

On February 1, 1909, and June 28, 1909, two ordinances were passed (C. P., p. 2602, and C. P., p. 911) amending Section 11 of the aforesaid ordinance of July 15, 1903, and in each of said amendatory ordinances, it is provided that: "This ordinance shall be accepted in writing by the Illinois Tunnel Company, assignee of said Illinois Telephone and Telegraph Company, its successors or assigns."

It therefore appears that by the express terms of both of the above mentioned ordinances of February 20, 1899, and July 15, 1903, the rights and privileges therein conferred were granted to the Illinois Telephone and Telegraph Company and its assigns.

In the case of *People v. Central Union Telephone Company*, 192 Ill. 307, the defendant company claimed to have purchased and succeeded to the rights of the Central Telephone Company, which latter company the City of Pontiac by ordinance had granted the right to use the streets in

connection with its telephone system. It was suggested in the argument in the Supreme Court that the Central Telephone Company could not assign its rights and privileges acquired under the ordinance granted to it. The court in disposing of this contention said (p. 311):

“That perhaps would have been true, but for the terms of the ordinance to the first company which grants the privilege to the ‘Central Telephone Company and its successors and assigns.’ ”

We are of the opinion that the Illinois Telephone and Telegraph Company had the right to assign its rights and privileges under the ordinances of February 20, 1899, and July 15, 1905, to the Illinois Tunnel Company subject to a provision of the ordinance of February 20, 1899, forbidding a sale to or agreement with any telephone company doing business in the City of Chicago, which agreement would tend to make competition inoperative.

The word “assigns” comprehends all those who take either immediately or remotely from or under the assignor, and the Illinois Tunnel Company as assignee of the Illinois Telephone and Telegraph Company would have the same rights in respect to the sale of its ordinance privileges that the former company had.

It was reported in the newspapers several months ago that the Chicago Tunnel Company had acquired all of the property, franchises and assets of the Illinois Tunnel Company through a certain foreclosure proceeding brought against the latter company in the United States Circuit Court for the Northern District of Illinois. We have no further evidence of this fact. We think that it would be advisable for you to require the Chicago Tunnel Company to file with you certified copies of its title papers, showing how it acquired title to the property and ordinance rights of the Illinois Tunnel Company, and also showing the relation of the Illinois Telephone and Telegraph Company and the Chicago Warehouse and Terminal Company to the Chicago Tunnel Company and their rights or interests, if any, in such rights as the Chicago Tunnel Company may have acquired under the above mentioned ordinances.

It is also reported that the present Illinois Telephone and Telegraph Company is a corporation which was organized under the laws of the State of Illinois in June, 1912, and that the old Illinois Telephone and Telegraph Company, to which the ordinances of February 20, 1899, and July 15, 1903, were granted, was dissolved in 1904.

When you receive the title papers, etc., we will be pleased to examine them and give you our views as to their sufficiency. If it shall appear that the Chicago Tunnel Company has acquired the ordinance rights of the Illinois Tunnel Company, you should then honor proper requests of the Chicago Tunnel Company for permits to do construction work under the ordinances of February 20, 1899, and July 15, 1903, granted to the Illinois Telephone and Telegraph Company and its assigns. We also think that all permits for construction work under these ordinances should be issued to the present owner of the privileges granted by the ordinances, and if it shall appear that the Chicago Tunnel Company is such owner and has not assigned such privileges to the Illinois Telephone and Telegraph Company or the Chicago Warehouse and Terminal Company, that the permits should be limited to the Chicago Tunnel Company, and that no permits should be issued to the Illinois Telephone and Telegraph Company or the Chicago Warehouse and Terminal Company.

We observe a paragraph in your letter reading as follows:

“In this connection I would also state that there has been made heretofore contracts between the Illinois Tunnel Company and other corporations and individuals that I believe under the ordinance require the consent of the City Council.”

We do not know what contracts you refer to. If you think that they should be brought more particularly to our attention, we will be glad to furnish an opinion as to the city's rights in respect thereto.

Yours very truly,
BRYAN Y. CRAIG,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

SEPTEMBER 18, 1912.

HON. JOHN ERICSSON, Chairman, Harbor and Subway Commission.

Dear Sir:

Your communication to the Law Department, dated August 7, 1912, in regard to the contemplated improvements of the Illinois Brick Company on the west shore of Lake Calumet and improvements and harbor developments to be made by the City of Chicago in Lake Calumet, has been referred to us for reply. We beg to submit the following:

Lake Calumet is not included in the harbor of Chicago as defined and bounded in Section 1097 of the Chicago Code of 1911. The Calumet River and Lake Calumet, however, have been created a harbor district known as Harbor District No. 4 under ordinance passed by the City Council November 20, 1911, under authority of the so-called Harbor Act of June 10, 1911.

Your first question is: "What is the status of the proprietary rights to lands between the government meander lines and the present shore line of the lake?"

The government meander line ordinarily is not a boundary line, and a shore owner's title under the decisions of our Supreme Court extends only to the water's edge. The title to the submerged lands, or the bed of the lake, is held by the State of Illinois in trust for the people, and under the provisions of the Harbor Act, the city is given authority "to use, occupy or reclaim all such submerged lands under the public waters of the state within the limits or jurisdiction of or bordering on such city as may be necessary or appropriate for any of the purposes" enumerated in the act.

Question 2. "If it is desirable to establish harbor lines, h. (see sketch) beyond which encroachments may be made without injury to any harbor scheme that may be evolved, by what authority can such harbor lines be established?"

The answer to this question is, that no express authority has been conferred upon the city to establish harbor lines. It is doubtful whether any such authority is implied from powers of the present city charter as enumerated in paragraphs 31, 32 and 33 of the Powers of the City Council, or

as contained in the provisions of the Harbor Act and no harbor lines have ever been established in Lake Calumet by the general government.

Question 3. "Does the City of Chicago obtain title to land or any part thereof made by filling between the shore line and any established harbor lines?"

The City of Chicago is authorized by the Harbor Act to use, occupy or reclaim all such submerged lands as may be necessary in harbor development as provided in the Harbor Act, but this can be done only after the riparian rights of shore owners have been cut off, or acquired under the provisions of the act, and Section 4 of the Harbor Act reduced the city's right or interest to a mere license to use, occupy and reclaim submerged lands for harbor purposes only and the city acquires no other title or interest.

Question 4. "Whenever riparian rights are involved, and if question 3 is answered in the affirmative, can the city exchange any such made land for the riparian or littoral rights as has been done by the Lincoln Park Commissioners along the shore of Lake Michigan?"

In view of the foregoing answers and the lack of statutory authority question 4 must be answered in the negative.

Question 5. "Can the City of Chicago issue permits for the deepening of Lake Calumet by dredging?"

Under authority of the Harbor Act and the ordinance which created Harbor District No. 4, passed November 20, 1911, and under authority of other existing ordinances, the city has the right to issue such permits.

Question 6. "Can the City of Chicago issue permits for the depositing of said dredged material in the lake along the shore?"

The answer to this question is that such permits can only be issued after the riparian rights of shore owners have been acquired.

In our opinion the Harbor Act should be amended so as to confer express power upon cities to establish harbor lines, and we further believe that Section 1097 of the City Code should be amended to include Lake Calumet in the harbor area of Chicago.

We return herewith sketch attached to your communication dated August 7, 1912.

Respectfully submitted,
NICHOLAS MICHELS,
Assistant Corporation Counsel.
JAS. G. SKINNER,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

SEPTEMBER 20, 1912.

O. MONNETT, Esq., Smoke Inspector.

Dear Sir:

Under date of August 27th you requested from this department an opinion on the following proposition:

“In the case of receivership by either a corporation or individual can suit be brought against the receiver, without asking consent of the receiver for a violation of an ordinance of the City of Chicago?”

We assume that you have in mind a violation of Section 2358 of the Chicago Code of 1911, prohibiting the emission of dense smoke from any smokestack or chimney of any building, premises, etc.

It is unnecessary to secure the consent of the court in bringing suit for violations of this section against a receiver appointed by the Federal Court. Congress passed an act in 1887, providing:

“Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or prosecution of his in carrying on the business connected with such property without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice.”

Where an action is brought against a receiver appointed by a state court for violation of this section and a judgment against him would be a claim upon the fund or property in his possession in our opinion it is necessary to obtain the

consent of the court to sue such receiver. While it may be true that the action is not that of an adverse claimant against a receiver for the possession of property or funds in his hands, nor is it an action brought to disturb the possession by the receiver of the property or funds in his hands, or to interfere with the beneficial use of such property; yet our Supreme Court has repeatedly held that a suit for a violation of a municipal ordinance is purely civil. The rule in our courts is that where civil suits are brought against receivers it is necessary to secure leave of the court.

We would suggest, however, that where a receiver violates the ordinance, that you bring your suit against him as an individual and not as a receiver. If brought against him as an individual it is unnecessary to secure leave of court. It is our opinion that the receiver is liable as an individual under the ordinance which provides:

“Any person, firm or corporation owning, operating or in charge or control of any locomotive, steamboat, steam tug; steam roller, steam derrick, steam pile driver, tar kettle or other similar machine or contrivance, or of any building or premises, or who shall cause or permit the emission of dense smoke within the city, from the smokestack or chimney of any such locomotive, steamboat, steam tug, steam roller, steam derrick, steam pile driver, tar kettle or other similar machine or contrivance, or from the smokestack or chimney of any building or premises so owned, *controlled or in charge of him, her or them* * * * shall be deemed guilty,” etc.

Undoubtedly property or funds in the hands of a receiver are *under his control and under his charge*. This being so, his liability under the ordinance we believe is established.

Beach on Receivers, as well as High on Receivers, states the liability of a receiver to be either personal or official and that as an officer of the court in the preservation and operation of the property any act of his *not* within the scope of the authority conferred by the order appointing him, does not bind the court and the receiver becomes personally obligated and must answer individually. This is an application of the principle which declares and fixes the personal liability of an agent who acts without authority of his principal. This

doctrine has been extended to public officers and must and does include receivers.

The receiver is the officer, the agent and hand of the court, and therefore his powers are limited and are derived from the order of his appointment. Any act of a receiver, not within the powers delegated to him by the court, even though such act is done in the administration of the affairs of the subject-matter of the receivership, will impose a personal liability upon such receiver. Beach on Receivers, 691-777.

The consent of the court is not necessary to maintain a suit against its receiver for a personal liability and in his personal capacity. Beach on Receivers, 716.

In our opinion, a receiver as an officer of the court is liable for every act in excess of the power conferred by the court. This is a fundamental principle of the law and there are very few cases which directly discuss it. We have been unable to find any case which expressly holds a receiver to be personally liable for a violation of a municipal ordinance while in the exercise of his duties under his appointment. In cases, however, which are somewhat analogous, applying the principle aforesaid, the courts devote almost all their attention to answering the question, has there been an excess of jurisdiction or of authority, or is the particular act not within the scope of the authority granted, and, in case the answer is in the affirmative, they, as a matter of course, hold the officer, receiver or agent, acting in excess of his jurisdiction or authority, liable.

There is no doubt at all but what receivers are liable like ordinary persons for a violation of penal laws affecting all persons in a community. Their official position, as an officer of a court, affords them no immunity from criminal responsibility.

Section 222 of the Criminal Code makes it an offense to cause a nuisance and is punishable by a fine for the first offense. For a subsequent offense by a fine and imprisonment in the county jail. So that under our statutes, causing a nuisance is a misdemeanor.

Our Supreme Court said, in *Harmon v. City of Chicago*,

110 Ill. 406, which was a prosecution under the smoke ordinance:

“Certainly anything that is detrimental to certain classes of property and business in a populous city, and is a personal annoyance to the public at large within the city needs not to be defined by ordinance or lexicographer to be known to the common mind as a public nuisance. It is so *per se*.

The usual remedy for public or common nuisance is by indictment, and this lies though a private action may also be maintainable in favor of an individual sustaining special and peculiar damages.

A person charged with causing or continuing a public nuisance may, at *common law*, be punished with fine or imprisonment, or both.

One indicted for a nuisance cannot defend on the ground that he acted as the agent of another in maintaining the nuisance, though this circumstance may serve to lessen the punishment.”

In the case of *Marshall Field & Company v. City of Chicago*, 44 Ill. App. 411, which also was a prosecution for a violation of the smoke ordinance, the court said:

“It is a matter of common knowledge that smoke becomes soot, which falls and blackens where it rests; that it is injurious to vegetation, to many kinds of goods and annoying to people. This common knowledge is so generally diffused in Chicago that no jury could be without it.”

It can readily be seen that our court has held that the unwholesome creation of smoke is a public nuisance *per se*.

Very truly yours,

HENRY A. BERGER,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

SEPTEMBER 21, 1912.

HON. JOHN E. TRAEGER, City Comptroller.

Dear Sir:

You ask whether the Chicago City Railway Company is liable to the city under an ordinance of June 18, 1906, for

monthly installments from March, 1907, to and including May, 1907, the company having disclaimed liability after the passage of the ordinance of February 11, 1907.

You also state that in making the payment of fifty-five (55) per cent. of their net receipts the company deducted from the amount remitted to the city the payments under the 1906 ordinance which they made for the months of February and March, 1907.

Section 43 of the ordinance of February 11, 1907, provides as follows:

“If the company shall accept this ordinance within the time limited therein for the acceptance thereof, then the rights and obligations of the city and company under this ordinance shall be the same as if this ordinance had been passed on February 1, A. D. 1907, and had been accepted by the company on February 1, A. D. 1907, and accounting shall be had as between the city and company as of that date.”

It follows from the language of the above provision that no payments made on account of the 1906 ordinance should have been deducted where such payments were made prior to February 1, 1907. In other words, the company did not owe the city anything after February 1, 1907, under the terms of the ordinance of 1906, and the payments for February and March inadvertently made were properly deducted after the commencement of the accounting period, namely, February 1, 1907.

Yours respectfully,
JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

SEPTEMBER 21, 1912.

HON. JOHN E. TRAEGER, City Comptroller.

Dear Sir:

You state that the Chicago Railways Company in making payment to the city of fifty-five (55) per cent. of their net receipts for the year ending January 31, 1908, made certain

deductions therefrom on account of amounts charged against their roads for compensation required to be paid by them under ordinances prior to the settlement ordinance of February 1, 1907, which amounts were paid by them to the city during 1907. You ask whether these deductions were properly made and whether the ordinances set forth in the exhibits accompanying your communication were merged in the ordinance of February 11, 1907. The latter portion of your inquiry has been answered in the affirmative in a communication of this date from this department.

Concerning the correctness of the deductions made by the company, Section 41 provides as follows:

“If the company shall accept this ordinance within the time limited therein for the acceptance thereof, then the rights and obligations of the city and the company under this ordinance shall be the same as if this ordinance had been passed on February first, 1907, and had been accepted by the company on February first, 1907, and accounting shall be had as between the city and the company as of that date.”

All payments made by the company prior to February 1, 1907, should therefore not be deducted by the company from the fifty-five (55) per cent. of its net receipts. Payments made on account of prior ordinances after February 1, 1907, were properly deducted from the fifty-five (55) per cent.

Yours respectfully,
JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

All papers herewith returned.

SEPTEMBER 21, 1912.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

In reply to your letter addressed to this department, dated August 22, 1912, and respectively signed by Wm. J. McCourt, Superintendent of Water, and Thomas H. Byrne,

Water Assessor, quoting a certain council order, passed on the 19th day of March, 1906, page 2947 of the Council Proceedings, purporting to be an agreement and adjustment of accounts between the County of Cook and the City of Chicago in the matter of claims between the city and county for the dieting of county prisoners at the House of Correction on the one hand and providing for the furnishing of free water to the Cook County Hospital in Chicago and the Dunning Institution, etc., a copy of said letter being hereto attached, asking for an opinion as to whether or not the State of Illinois, as successor of the county in the control of the latter named institution, is entitled to free water, by virtue of the Dunning Institution having been formally and legally transferred from the County of Cook to the Board of Administration of the State of Illinois. which now has the care, management and control of said institution (see proceedings published by the authority of the Board of Commissioners of Cook County, Illinois, dated Monday, July 1, 1912), and also (see Session Laws of 1911 and 1912, Charities, Section 20), this department begs leave to report and state as follows:

1. Said council proceeding above mentioned is not an agreement but is in reality an order.

2. An order is revocable.

3. Said order was from all intents and purposes passed upon the presumption that the then existing business relations between the County of Cook and City of Chicago were to continue, and this is the reason why said compromise was made; those relations do not now exist.

4. The said above order cannot be extended or in any manner enlarged for the benefit of the state because its words, terms and phraseology will not permit such construction.

5. If said order could be construed to be an agreement it contains nothing within its terms by which it would extend the privileges therein already conferred upon the county to the State of Illinois, as no such words as "successors," "assigns," were employed by the City Council, nor was it ever intended to include successors and assigns of the County of Cook relative to the subject-matter therein stated.

6. The state could in no manner enforce said order

or purported agreement because the state was not and is not a party to the same.

7. There is a want of privity of contract between the City of Chicago and the State of Illinois.

8. The Dunning Institution is outside of the limits of the City of Chicago and neither the Cook County Hospital of Chicago, nor the Dunning Institution, without the limits of the City of Chicago, are or ever were entitled to free water under Section 2755 of the Chicago Code of 1911, because this provision contains the following clause:

“Nothing herein contained shall be held to exempt the Cook County Hospital, or any other institution, building, structure or premises owned or occupied by the County of Cook or used for its purposes, from the payment of water rates and charges for water supplied to it from the city water works system.”

For the above mentioned reasons this department is of the opinion that the State of Illinois cannot claim free water for the Dunning Institution, neither under said order nor under any ordinance.

While the state is a sovereign power and never assumes the debts of any corporation which it takes over under its control and in most cases cannot be sued, still it is also true that the State of Illinois is not entitled to be furnished with any necessities of life free of charge, and it should be made to pay for water the same as any individual or private corporation is obliged to do. If the State of Illinois desires to obtain free water or water on compromised rates, grounds for the compromise must exist and a new agreement must be made.

This department recommends that the City of Chicago install a water meter, or as many water meters as are necessary, into the Dunning Institution for the purpose of measuring the amount of water consumed by such institution, so that bills may be rendered to the state for the same.

Yours very truly,

J. J. VITERNA,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

SEPTEMBER 23, 1912

HON. JOHN McWEENY, Superintendent of Police.

Dear Sir:

Under date of September 16th you requested this department for an opinion as to whether the owners of wagons engaged in carrying mail for the United States government are obliged to pay a vehicle tax under our ordinances.

The Legislature of this state passed an act ceding to the United States exclusive jurisdiction over certain lands acquired for public purposes within this state and authorizing the acquisition thereof. (Chapter 143, Hurd's Revised Statutes.)

Section 1 of the act provides:

"That the consent of the State of Illinois is hereby given, in accordance with the sixteenth clause, eighth section of the first article of the Constitution of the United States, to the acquisition by the United States, by purchase, condemnation or otherwise, of any land in this state required for custom houses, court houses, post-offices, arsenals or other public buildings whatever, or for any other purpose of the government."

We are of the opinion that an exemption from taxation of any kind in favor of the United States applies only to land acquired and owned by the United States.

Section 2 of the act aforesaid cedes exclusive jurisdiction *in and over land* acquired and owned by the United States.

It is not an interference with the exercise of governmental functions to impose a vehicle tax upon owners of wagons used in carrying mail for the government.

While the City of Chicago may not have jurisdiction over property owned by the government and used for governmental purposes the jurisdiction of the city extends to property which is merely rented.

It was held in *United States v. Tierney*, 1 Bond (Ohio) 571, 573, that

"The places over which exclusive jurisdiction is granted are those which have been *purchased* by the United States for some of the purposes specified in the Constitution. And the grant of power does not extend to a place or tract of land *rented* by the government for a temporary purpose."

Our courts have held a statute exempting property from taxation must be strictly construed; that a grant of exemption from taxation is never presumed and that every presumption is in favor of the liability of taxation.

In the particular case cited by you, one H. G. Seger has a contract with the government for carrying mail. The six wagons engaged in this work, we understand, are his property. The government does not own the wagons, but under contract merely rents their use.

We are of the opinion that owners of wagons under a contract of carrying mail for the government are not exempt from the payment of a vehicle tax and must therefore comply with the city ordinances relative thereto.

Yours very truly,
HENRY A. BERGER,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

SEPTEMBER 26, 1912.

HON. HERMAN F. SCHUETTLER, Acting General Superintendent of Police, Chicago.

Dear Sir:

Under date of September 21, 1912, you requested of this department an opinion as to whether or not employes of the theaters in Chicago, who do bill posting in connection with other work around the theater, come within Section 171 of the Chicago Code of 1911.

Section 171 of the Code provides:

"No person or corporation shall carry on the business of bill posting, within the city without first having obtained a license, as hereinafter provided."

The meaning of the phrase "carry on" when applied to business is well settled. The "carrying on of business" or the "doing of business" in connection with the subject-matter of your inquiry, in our opinion, is the posting or pasting of bills, posters and advertisements, in the city, as a

business, separate in itself and distinct from any other line of employment.

Where a theater in order to advertise a play or production, which it offers or presents to the public, employs a person to post advertisements of such play or production and such employe is under the direction, control and supervision of the theater, as an employe, on a salary, and his services are performed entirely for such theater, such bill poster is not carrying on the business of bill posting within the meaning of Section 171 and is not required to obtain a license.

In our opinion, it is only such persons, firms or corporations who conduct the business of bill posting as independent contractors and who offer their services to the public and render such services to whomever desires them that come within Section 171 and are required to first obtain a license.

In your communication it is stated that the particular bill posters in question do the bill posting together with other work in connection with the theaters; and a communication, signed by Thomas G. Reynolds, secretary of the International Alliance Bill Posters and Billers of America, addressed to Hon. William H. Sexton, under date of November 20, 1912, states that the particular bill posters in question are employed on a weekly salary to advertise current attractions for theaters.

It is our opinion that such bill posters so employed are not carrying on the business of bill posting.

Very truly yours,

HENRY A. BERGER,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

SEPTEMBER 26, 1912.

HON. FRANCIS D. CONNERY, City Clerk.

Dear Sir:

Replying to your communication dated September 17, 1912, addressed to William H. Sexton, Corporation Counsel,

asking for an opinion as to the license fee to be charged for the balance of the year to applicants for licenses as bill posters, where no vehicle is used in connection with such business, we beg to state as follows:

Section 173 of the Chicago Code of 1911 provides that—

“Upon payment to the city collector of a license fee at the rate of one hundred dollars per annum, any such applicant shall be entitled to a license to carry on such business as aforesaid; provided, however, that any person carrying on the business of bill posting, who does not use a horse and wagon or other vehicle in his said business, shall be charged for such license *at the rate of twenty-five dollars per annum.*”

Under Section 1516 of the Chicago Code of 1911 “every license shall expire on the thirty-first day of December following the date of its issuance except where otherwise specifically provided,” and the question arises whether an applicant for a license is bound to pay the entire sum of \$25.00, or whether he should pay only the proportion of \$25.00, covering the period expiring December 31st, following the date of the issuance of said license.

The question of pro-rating license fees has been covered in various opinions of this office. In a very exhaustive opinion dated August 20, 1907, addressed to E. J. Magerstadt, City Collector (Opinions of the Corporation Counsel, April 15, 1907, to December 31, 1908), there was presented the question as to whether cigarette licenses could be pro-rated. The language in that ordinance was identical to that now under discussion, the words being “*at the rate of \$10.00 per annum.*” The conclusion reached in that opinion was that the word “price” could be substituted for the word “rate;” so that the phrase would read “at the price of \$100.00 per annum;” and that the city had a right to require that the sum of \$100.00 be paid “as the license fee for the full license year or for any fractional part thereof.”

Since this opinion was written, there is even less doubt, since Section 1516, above referred to, provides that—

“* * * no license shall be issued for any period of time less than a year for a less sum than the full annual license fee, except where otherwise *specifically* provided.”

In our opinion the words "at the rate of \$25.00 per year" do not bring the bill posters' license within the above exception and the sum of \$25.00 should be paid by each applicant, whether for a full or fractional part of a year.

This view is in consonance with the practice adhered to by your department in charging full annual license fees in all cases except where the ordinance clearly and expressly provides otherwise.

Very truly yours,

MAX M. KORSHAK,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

OCTOBER 1, 1912.

BOARD OF ELECTION COMMISSIONERS, City Hall.

Gentlemen:

This department is in receipt of a communication from your honorable body requesting an opinion concerning its duties in regard to calling an election to fill the vacancy occasioned by the death of Max Eberhardt, former associate justice of the Municipal Court of this city.

The scope of the opinion desired has been restricted by a personal interview between the writer and a member of your board to the sole question of whether the Board of Election Commissioners is authorized and empowered to call an election to fill the vacancy in the office of municipal justice, such office being formerly held by the Honorable Max Eberhardt, whose death occurred some six months ago.

The duties of the Board of Election Commissioners are to be found in Sections 19 and 20 of Article II, Chapter 46, Hurd's Revised Statutes, pages 1016, 1017, as follows:

"§19. It shall be the duty of such board to give timely notice through the press of the time and place of registration and election in each precinct of such city, village or incorporated town; and they shall also cause the printed list and supplement of the registration for the previous election to be posted up at the place of registration, two days before such registration, with a

printed notice of the time and place of the next registration. This to be obligatory only after the first registration under this act."

"§20. Said board of commissioners shall make all necessary rules and regulations, not inconsistent with this act, with reference to the registration of voters and the conduct of election; and they shall have charge of, and make provision for, all elections, general, special, local, municipal, state and county, and of all others of every description, to be held in such city or any part thereof, at any time or in such village or incorporated town as the case may be."

It will be noticed that the powers of the board are to give timely notice of the time of registration and election and to have charge of and make provision for all elections.

It is clear that the notice referred to is a notice of an election previously called or designated by proper authority. The provision that they shall have charge of or make provision for all elections, means that they shall provide the machinery for conducting elections theretofore called.

The calling of an election in general is an executive function ordinarily vested in the governor upon notice to him by some functionary, in the case of vacancy that the office to be filled has become vacant. Thus Section 13 of the Municipal Court Act, Chapter 37, Hurd's Revised Statutes, page 712, provides:

"Whenever any such vacancy occurs, the chief justice shall forthwith notify the governor thereof, who, upon receiving such notice, shall, as soon thereafter as may be practicable, issue a writ of election, as in other cases."

A similar provision is made in the case of a vacancy occasioned by the death of a bailiff.

It would seem strange that the legislature should provide with such particularity for the calling of an election by the executive with respect to the filling of the subordinate offices of clerk and bailiff, and make no similar provision with regard to vacancies in the more important office of associate justice.

It cannot be well believed that the legislature intended that any one of inferior authority to the chief executive of

the state should issue a call or writ of election for the office of justice, yet the fact confronts us that no provision is made in such case for such executive action. The most that can be said is that the duty of making such a call has not been imposed upon any one, and least of all upon your board, whose duties are prescribed by the statute, which, in making an enumeration thereof, has excluded the idea of embracing among such duties any than those specifically mentioned. Had the legislature intended that your board should call elections or issue writs of election, it can hardly be doubted that it would have expressed such intention by apt language, and I take it to be impossible that the words "have charge of," "make provision for" or "give timely notice of" contain a power to exercise such an important executive function as the issuing of a writ of election. Had such power been intended by the legislature to be confided to your board, it would naturally have been expressed at once and in advance of all other provisions and in no uncertain terms.

I, therefore, reach the conclusion that under the law the Board of Election Commissioners in the case at hand has no power or authority to call an election for the filling of the office in question.

Very truly yours,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

OCTOBER 1, 1912.

FRANCIS J. OWENS, ESQ., Commissioner of Track Elevation,
Chicago.

Dear Sir:

We have your communication of May 13, 1912, in regard to the above entitled matter. In this communication you ask us to advise you as to what may be done in the direction of enforcing compliance by the C. & O. P. El. R. R. Co. with the ordinance requiring it to elevate its tracks.

This is not by any means the first attempt which the City

of Chicago has made to induce or compel this company to elevate its tracks at this point. In 1906 the city council passed an ordinance requiring the said road and the C. & N. W. Ry. Co. to elevate their roadbeds and tracks as far west as Austin avenue. This ordinance had the usual clause requiring the acceptance of each company within a specified time and providing that the ordinance should only become effective upon such acceptance. The C. & N. W. Ry. Co. accepted the ordinance but the C. & O. P. El. R. R. Co. declined to accept it. The tracks of the steam railway were then elevated and this elevation of the tracks of the steam railway in close proximity to the tracks of the other company, which are still on the surface of the street, has materially increased the danger from the running of the cars of said company on the surface of the street.

The city passed another ordinance in 1909 again requiring the Oak Park line to elevate its tracks at this point. This ordinance also provided that it should become effective when accepted within a certain time by the company. The company again declined to accept the ordinance. Thereafter, and on November 22, 1909, the city council passed an ordinance, the first section of which was as follows:

“Paragraph 1. That no person or corporation shall propel, or cause to be propelled, any single car or train of cars on any track or tracks situated on the surface of any street in the City of Chicago, across an intersecting street, when the track or tracks on which such single car or train of cars is or are propelled run parallel to the tracks of any steam railroad the tracks of which are elevated on an embankment and are carried over intersecting streets by a bridge or bridges, where the condition is such that any rail of said surface track is within fifteen (15) feet of the end of any abutment wall supporting said bridge or bridges.

“Paragraph 2. It is hereby declared to be a nuisance for any person or corporation to operate a single car or train of cars in violation of the foregoing paragraph.”

The second section of this ordinance provided a fine for each time that the company violated the ordinance. The company took no notice of the ordinance and the city under-

took to enforce obedience by proceeding to compel payment of the fines. In the Municipal Court judgment was entered for the defendant, and the case was appealed by the city directly to the Supreme Court. The Supreme Court affirmed the judgment of the Municipal Court, holding that the ordinance was in violation of contract rights and amounted to the taking of property without compensation.

Chicago v. Oak Park El. R. R. Co., 250 Ill. 486.

It was urged in the argument of this case that since the ordinance *only* prohibited the running of cars, under the circumstances indicated, *on the surface of the street*, it was in effect a track elevation ordinance. But the court expressly refused to accept this view. On this question the court said (page 494):

“This ordinance is in no sense one requiring track elevation. It does not pretend to permit the separation of the grade of the railroad tracks from the grade of the street, either by elevating or depressing the roadbed and tracks of the railroad.”

It is obvious, therefore, that this decision is not to be regarded as an authority against the power of the city to compel the elevation of the tracks of this railroad between the streets specified.

The Supreme Court of this state has several times affirmed the right of the city council of a large city in this state to compel railroads running through such city to elevate their tracks provided the conditions are such as to call for such elevation in the interests of the public safety, and provided the ordinance is reasonable.

Summerfield v. Chicago, 197 Ill. 270.

People v. A. T. & S. F. Ry. Co., 217 Ill. 594.

Weage v. C. & W. I. Rd. Co., 227 Ill. 421.

Chicago Flour Co. v. Chicago, 243 Ill. 268.

Murphy v. C. etc., Ry. Co., 247 Ill. 614.

N. Y., etc., Rd. Co. v. Bristol, 151 U. S. 556.

But neither the Supreme Court of the United States nor the Supreme Court of this state has ever decided, so far as we have been able to find, that a city council can pass an ordinance directed against one particular railroad, similarly

situated in respect to the need of elevation with a number of other railroads, and compelling that road alone to elevate. Nor can we find in the opinions of the Supreme Court of Illinois any implication to the effect that, for any reason, such an ordinance will be excepted from the operation of the general rule which forbids class legislation. In the cases in 217 and 247 Illinois, cited above, the court was dealing with a track elevation ordinance passed by the council of the City of Joliet. It appears from the statement in the first of these cases that the ordinance covered all the roads then running through that city. The court says at page 601:

“It may also be conceded that in carrying out a general plan to require railroad tracks to be elevated in a city like Joliet some change in or even the vacation or closing up some of the streets and alleys may become necessary in order to effectually carry out the scheme. We do not question the power of municipalities to order railroad companies within their corporate limits to elevate their tracks across all public streets and alleys, nor that they may not, in order to carry out that policy, authorize the vacation, closing or permanent obstruction of certain of its streets and alleys.”

The implication here would seem to be that the right to compel elevation is asserted only in favor of a general ordinance compelling all railway companies similarly situated within the city to elevate their tracks.

Mr. Mathias, who drew the ordinance you refer to, evidently had this difficulty in mind. The ordinance will be found on page 1638 and the following pages of the Council Proceedings of November 13, 1911. Not being authorized to draw an ordinance calling for the elevation of all roads in the city not yet elevated, Mr. Mathias endeavored to avoid the difficulty by creating a class consisting of tracks which were substantially parallel to and within fifty feet of the base of the structures supporting the elevated tracks of other railroads where subways pass under the elevated plane of such other railroads. By the recitals to the ordinance he states clearly and forcibly the reasons by which he seeks to justify such a classification. The ordinance is by its terms applicable to every railroad coming within this class.

After examining a number of decisions of the Supreme

Court of Illinois and of the Supreme Court of the United States bearing on the question of what classifications may and what may not be made for purposes of legislation, I find myself unable to say with confidence whether an ordinance based upon the classification made under this ordinance would or would not be held to be reasonable and valid. I incline to think that it would.

The only way of testing the matter is to undertake to enforce the penalty provided for in the ordinance. It is provided under Section 16 of the ordinance that any railroad company coming within the class shall begin the physical work of elevating its tracks as by the ordinance provided within ninety (90) days after the passage and publication of the ordinance. Section 21 provides that in the event of a failure by any such railroad company to comply with this requirement such railroad company shall be fined the sum of two hundred (\$200.00) dollars for each day after said ninety days. By proceeding against the company to enforce these fines, the validity of the ordinance can be tested in the same way as was the validity of the ordinance tested in the case of *Chicago v. O. P. El. R. R. Co.*, cited above.

Yours respectfully,

WILLIAM DILLON,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

OCTOBER 1, 1912.

HON. GEORGE B. YOUNG, Commissioner of Health.

Dear Sir:

You ask whether the rules of the health department, which have been confirmed by action of the city council in accordance with Section 1167 of the Chicago Code of 1911, constitute valid ordinances such as can be enforced in court against persons violating the same.

Section 1167 provides as follows:

“The Commissioner of Health shall have power to make such rules and regulations in relation to the sanitary

condition of the city and for the prevention and suppression of disease, not inconsistent with the provisions of this chapter, as he may deem necessary or advisable. Such rules or regulations shall not take effect and be in force until approved by the city council, except in cases of emergency as hereinafter provided for. In case of contagious or epidemic disease or of danger from anticipated or impending contagious or epidemic disease, or in case the sanitary condition of the city shall be of such a character as to warrant it, it shall be the duty of the Commissioner of Health to make such rules and regulations and to take such measures and to do and order to be done and cause to be done such acts for the preservation of the public health (though not herein or elsewhere or otherwise authorized) as he may in good faith believe and declare the public safety and health demand, and all such rules and regulations so declared by the Commissioner of Health to be emergency rules and regulations shall, as soon as may be after the promulgation of the same, be reported by the said Commissioner to the city council for approval."

Section 3 of Article V, Chapter 24, Hurd's Revised Statutes, 1911, page 269, provides as follows:

"All ordinances of cities and villages imposing any fine, penalty, imprisonment or forfeiture, or making any appropriation, shall, within one month after they are passed, be published at least once in a newspaper published in the city or village, or, if no such newspaper is published therein, by posting copies of the same in three public places in the city or village; and no such ordinance shall take effect until ten days after it is so published. And all other ordinances, orders and resolutions, shall take effect from and after their passage, unless otherwise provided therein."

The object of the foregoing section is clearly to give the public at large notice of the contents of ordinances passed by the council.

Provided the ordinances you refer to confirming the rules set out the subject-matter of the rules in the confirmation ordinance and are published in conformity with the statute, I consider that they are valid ordinances and enforceable against violators thereof. A mere approval by the council of a collection of rules of the health department without setting out these rules would give the public no information as to

what rules contained and would not be a compliance with the statute.

You state that Mr. Boord, formerly an assistant of this department, gave it as his opinion that

“the Municipal Court law giving that court authority to enforce ordinances, etc., said nothing about rules, and that therefore such rules could not be enforced.”

I find no opinion in the files of this office from Mr. Boord upon this subject, but in a personal conversation Mr. Boord stated that what he did say to a member of your department was that the Municipal Court would not take judicial notice of the rules of the health department.

The theory on which the council proceeds in confirming the rules of the health department, is to make such rules an expression of its own legislative intent, it being the law-making body of the city. The health department has no power to make laws or rules which can take the place of laws or ordinances.

All legislative action must emanate from the legislative body, and the rules of the health department, if adopted and set forth in full, become valid ordinances after proper publication, but not otherwise.

From a conversation between yourself, Mr. Kraft of the prosecuting attorney's office and the writer, it would appear that an emergency exists not as to such rules of the health department as have been adopted by the city council, but with reference to enforcing the provisions of the general penalty clause 1493, which, in effect, provides that a person disobeying the rules of the health department (whether adopted by the council or not) shall be subject to a fine.

Such rules of the department as have received no council sanction are plainly invalid for the purpose of conducting prosecutions thereunder.

For the purpose of correcting the invalidity of Section 1493, I deem it advisable that an amendment should be pre-

pared to the code, the general nature of which I have heretofore discussed with you.

Very truly yours,
JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

OCTOBER 4, 1912.

H. F. SCHUETTLER, Esq., Acting General Superintendent of Police.

Dear Sir:

Replying to your letter of September 26, 1912, transmitting letter (hereto attached) of J. C. McDonnell, chief of bureau of fire prevention and public safety, asking for an opinion as to what authority your department has and what steps should be taken in reference to the carrying on of a dry cleaning establishment by H. Cohen, at 1115 North Ashland avenue, as alleged, in violation of several of the provisions of our ordinances, I beg to state as follows:

The provisions concerning dry cleaners are contained in Chapter LXXXVI of the Chicago Code of 1911 and have been incorporated with some changes and additions in Article XI of an ordinance "Creating a Bureau of Fire Prevention and Public Safety," dated July 22, 1912. (C. P., 1543.)

While there is a provision in the ordinance giving the Mayor the power to revoke any license for any violation of the provisions of this ordinance, yet there is nowhere any provision giving the Superintendent of Police the power to prevent the carrying on of a dry cleaner's establishment when violations of our ordinances are found and we doubt whether such power exists.

There is, however, a provision for "Penalty" (Section 334, C. P., 1620), and we would respectfully advise that this matter be placed with the law department for prosecution.

Very truly yours,
MAX M. KORSHAK,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

OCTOBER 4, 1912.

HON. RAY PALMER, City Electrician.

Dear Sir:

In response to your letter concerning the lighting of Dearborn street and conversations had with you regarding same, in which the question of the validity of the proposed contract with the Dearborn Street Improvement Association is involved, we beg to submit the following:

The gist of the proposition under consideration is whether the city can take advantage of an offer of the Dearborn Street Improvement Association, by which it can secure the lighting of Dearborn street, from Lake street to the depot of Polk street, with 107 flaming arc lights at the same expense to the city as would result from the maintenance of 29 lights of this kind to which that part of the street in question would be entitled under the new distribution lay-out.

The initial cost would indeed be less than the installation of 29 new lights as proposed, even if the city were to regard the furnishing of the lamps as a new item of expense.

The association proposes to contract with the Sanitary District of Chicago for a lighting equipment which contemplates the erection of 16 new poles, of which six are to be extra length on account of their proximity to elevated stations, and the use of trolley poles of the Chicago Railways Company, the association having obtained permission to equip these with arc lamps. The entire equipment is to be turned over to the city and become the property of the municipality. In this way 107 lamps would be provided for this district in place of 29 which the city would otherwise arrange for. It is further proposed to have the association pay the city the expense of maintaining these lights less the expense of maintaining the 29 lights which the city would otherwise maintain.

The only investment of any kind that the city is to make is that the lamps are to be furnished by it. As stated above, the cost of these 107 lamps is less than the expense of installing the equipment for 29 complete lights, including poles and connections.

The legal questions raised are whether the city has a right to make a contract for this kind of an installation,

whether it has the right to loan city property in the shape of lamps for the purpose, and whether it has the right to sell electricity to the improvement association for lighting purposes?

As to the first of these questions there can be no doubt concerning the right of the city to provide for street lighting in any manner which may be regarded as desirable, either by doing the work itself or by contracting with other parties for having it done. It is also within the power of the city council to specify a larger or smaller number of lights for the street, the only limitation on this being that local benefits are to be properly assessed against the property improved. Since no such question arises in the present instance, there can be no legal objection to a contract of this character on that ground.

As to the so-called loaning of the lamps, while there would be some doubt if the equipment in question were to be retained by the association, we take the position that it is not in fact loaning city property when the city retains control of the lamps and uses them for public purposes on an equipment which under the terms of the contract will become city property.

On the last point, concerning the sale of electricity for this purpose, we believe that the act conferring power upon the city to sell surplus electricity, passed in 1905, clothes the city with authority to do the thing proposed. The act in question is somewhat vague in its terms. It provides that the city may sell "surplus electricity." Just what is meant by that is not definite, but it is only fair to presume that where more electricity is obtained from the Sanitary District on a given equipment than is necessary for the particular section of the city where it is used, it may be regarded as surplus and sold by the municipality in the manner that is here proposed. This is the condition in the present case, according to the information at hand.

Therefore, we are satisfied that the city has the right to make the proposed contract, which would unquestionably result in much better lighting of this street and would probably lead to similar contracts on other streets. We recom-

mend, however, that the city's interests be properly safeguarded by the enactment of an ordinance such as is ordinarily passed when privileges are granted in streets and public ways. A bond should be required for the faithful performance of the agreements of the grantee.

We have drafted an ordinance covering this proposition and submit same herewith. If satisfactory to you and to the association, it could be introduced at a meeting of the city council for action.

Yours respectfully,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

OCTOBER 4, 1912.

THE TITLE GUARANTY & SURETY COMPANY, Chicago, Illinois.
Gentlemen:

Replying to your letter in regard to above matter of September 23, 1912, which is returned herewith, we beg to refer you to the copy of a petition, filed in the matter you refer to, which is annexed to this letter, and which contains as brief a statement of the facts of this case as we are able to frame.

The portion of the alley which consists of the roof of the cellar referred to in this statement is not excepted from the specification in the special assessment proceeding. The specification calls for the paving of the whole alley. Hence the difficulty of going ahead and paving the rest of the alley, leaving out this part. The attorneys for the receiver and for the owners of the property strongly urged this course; but we did not see our way to advising it, since it would probably result in invalidating the special assessment.

We presented this petition to Judge Scanlan, then sitting as chancellor, in the receivership matter, on the urgent request of the contractor, Mr. O'Brien. He asked us if possible to find some speedy way of settling the matter so that he could go ahead with his work. We were of the opinion at the time,

however, that if the receiver and the parties interested in the property claimed that they were entitled to maintain the cellar in the alley, and stated any plausible grounds in support of this claim, the court would decline to decide the controversy in a summary way in the receivership matter, and would leave the city to its remedy by ejectment or otherwise.

And so it proved. The receiver and the parties mainly interested in the property answered the petition and alleged that the cellar in the alley was excavated by and with the consent of the City of Chicago, and had been maintained by and with its consent and knowledge for upwards of thirty-five (35) years, and without any claim or interference upon the part of the City of Chicago or any one else; that the same was constructed and had been maintained at a very substantial cost to the owners of said property, and had been in constant use and was a valuable improvement and part and parcel of said property.

On this showing in the petition and answers, the court declined to determine the matter in a summary way upon petition in the receivership.

It remains for the city either to proceed by ejectment to test the question of the right of these parties to keep the cellar in the alley or (assuming it is now too late to amend the specification in the present special assessment proceeding) to start a new special assessment proceeding. Either of these courses would take considerable time.

Meantime, in so far as the contractor's failure to complete his contract is due to the presence of the cellar in the alley, and to his consequent inability to pave that part of the alley, there would not seem to be any danger of liability either on his part, or on your part, as his bondsman.

Yours respectfully,

WILLIAM DILLON,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

OCTOBER 5, 1912.

HON. JOHN A. RICHERT, Chairman, Finance Committee.

Dear Sir:

We have your letter of June 24, 1912, in regard to the above entitled matter. In this letter you refer to the petition of Richard A. and Thomas Edgeworth for the payment of \$5,000.00, etc., as being enclosed therewith. What is enclosed appears to be a draft of an ordinance providing for the payment of \$5,000.00 to the parties named as compensation for the damage done to their property. Presumably, this is the ordinance which Messrs. Richard and Thomas Edgeworth desire your committee to recommend for passage and the council to pass.

We have no information whatever as to the matter in which, or the grounds upon which, the estimate of \$5,000.00 is arrived at. We might possibly be able to form some idea as regards the extent to which the claimants' property has been damaged by the vacation of the street, by investigating in the proper department; but, in view of the great number of cases in which these deposits to cover damages arising from the vacation of streets or alleys have been made, we are of the opinion that it would be good policy for the city to refuse to pay any claims of this character until such claims have been investigated and established in court.

We, therefore, advise your committee not to recommend this ordinance for passage.

Very truly yours,

WILLIAM DILLON,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

P. S.—Enclosed herewith said ordinance.

OCTOBER 7, 1912.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

This department some time ago was directed by the Corporation Counsel to prepare an opinion as to the steps necessary to be taken by the City of Chicago to acquire possession of certain lands for street purposes lying between Peshigo court and the waters of Lake Michigan, and between the Michigan Canal and the north line of Indiana street, produced to the lake.

Inasmuch as a very exhaustive opinion has already been rendered by Mr. James G. Skinner, Assistant Corporation Counsel, and approved by Mr. William H. Sexton, Corporation Counsel, bearing on the ownership and title to the lands sought to be acquired for the uses above indicated, it will not be necessary to discuss herein all the points reviewed in that opinion. I will say, however, that I have made a very careful examination of the opinion herein referred to and I fully agree with the conclusions reached by Mr. Skinner.

There is no doubt that the title to the land in question is in the State of Illinois and that being the case the City of Chicago has no power to condemn lands owned by the state.

It is a well settled principle of law that the right of riparian owners to build piers or wharfs or other obstructions, is not recognized by the common law. It therefore follows that any structure placed upon the lands of the state below or beyond the water's edge in the waters of Lake Michigan is a purpresture and may be abated in a proceeding brought by the Attorney General on behalf of the People. In *Revell v. People, supra*, the court said:

"It may be conceded that under the doctrine of protection a shore owner may erect structures on his own land for protection against erosion, but as we understand the law he has no right to enter upon the lands of the state and erect thereon such structures, and when he undertakes to do so he is a trespasser. The state, holding the submerged lands of the lake in trust for the people of the state, would be false to its trust should it permit shore owners to encroach upon the public domain and

gradually appropriate such property to their own use. Here, in the erection of the structures complained of in the information, there has been a clear violation of the law, and no reason occurs to us why the structures should not be abated on the application of the people."

There is no doubt then that the strip of land bounded on the north by the north line of Indiana street, produced east to the lake, and on the south by the Michigan Canal, on the west by Peshtigo court and on the east by Lake Michigan, belongs to the state, and that the corporation claiming title thereto has not good title to it, having obtained possession of it illegally in the first place. And the title to the land in question being in the state, the City of Chicago could not sustain a condemnation suit to acquire possession of any portion of this land, because the doctrine of condemnation in this state is that the right of eminent domain is the power of the state to appropriate private property to the public use, and it extends to every kind of property and to every kind of use. Such power extends only to the taking of private property. The statute does not authorize the taking of the property of the state. Such property is already devoted to the public use and is subject to the control of the state which may authorize such use of it as it may see fit, consistent with the rights and interests of the general public in the same. In *Edwardsville v. County of Madison*, 251 Ill. 267, the court said:

"The property of the state is not subject to condemnation under our law. Our statute (Chapter 47) only authorizes the courts of the state to entertain jurisdiction of proceedings for condemnation when the right to take private property for public use is involved (*People v. Sanitary District*, 210 Ill. 171), otherwise the city might condemn the court house square for an engine house, but under our law such an occurrence is impossible."

I am therefore of the opinion that the proper course for the city to pursue in this matter is to obtain the necessary authority from the State of Illinois to enter upon the land in question for the purpose of extending Illinois and Indiana

streets from the present terminals to the waters of Lake Michigan.

Respectfully submitted,

PHILIP J. McKENNA,
*Attorney for the Board of
Local Improvements.*

Approved:

WM. H. SEXTON,
Corporation Counsel.

OCTOBER 7, 1912.

HON. RAY PALMER, City Electrician.

Dear Sir:

You request an opinion as to whether it is safe for the city to place valuable and permanent improvements on certain property at 712 South Halsted street, now held by the city under a lease from Mary A. King, for a term commencing 1894, "for and during and until the term of the natural life and until the death of said party of the first part."

In my opinion it would be decidedly unsafe to place valuable improvements upon property, the tenure of which by the city might be terminated at any moment by the death of the lessor.

I state this simply as a legal proposition but express no opinion as to the business policy involved in such a procedure.

I would suggest that it might be possible for the city to make a new lease jointly with the present lessor and her reversioners, if they can be ascertained, so that in case of the death of the present lessor the then holders of the estate would be bound.

This course would necessarily require the consent to the change of the present lessor as well as that of the reversioners and remaindermen.

We return herewith the lease submitted with your communication.

Very respectfully yours,
JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

OCTOBER 7, 1912.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF
CHICAGO.

Gentlemen:

On the 20th day of May, 1912, your honorable body passed the following order:

“Ordered, that the Corporation Counsel be and he is hereby directed to ascertain by what legal right or authority the steam railway passenger station has been removed from the intersection of Centre avenue and the railway rights of way at West Seventy-fifth street; also, if the city have power, to take such legal measures as shall be necessary to re-establish said station that that point.”

The Wabash Railroad Company, which maintains passenger train service across said intersection, does so by virtue of an ordinance granted to the Chicago and Strawn Railway Company by the Board of Trustees of the Town of Lake, November 14, 1879.

I fail to find in said ordinance any provision for the maintenance of passenger stations by the company along its right of way.

The ordinance of July 13, 1908, providing for the elevation of the tracks of said railroad company, is likewise silent on the subject. Section 9 of this ordinance merely provides that said company *may* construct and maintain station buildings with the necessary waiting rooms and ticket offices at a sufficient distance back from the building or lot line of streets where subways are provided for.

Section 12 of this ordinance expressly limits the future exercise of the police power of the city to speed, length of trains, number of cars to a train, and the maintenance of gates, flagmen, watchmen, signals and signal towers.

There is no provision in the Chicago Code of 1911, making it obligatory upon railroad companies to maintain station buildings all along their rights of way.

The Revised Statutes of Illinois appear to provide a definite remedy in the premises for towns and villages having a population of two hundred or more.

For the information of your honorable body, I quote Sections 50 and 51 of Chapter 114:

“That all railroads in this state carrying passengers or freight shall, and they are hereby required to build and maintain depots for the comfort of passengers and for the protection of shippers of freight, where such railroad companies are in the practice of receiving and delivering passengers and freight, at all towns and villages having a population of two hundred (200) or more, on the line of their roads, and roads leased or operated by them.”

“Any railroad company in this state failing to comply with the provisions of the preceding section after this act shall go into effect, and within ninety days after notice in writing of its failure to comply with the provisions of said section shall have been served upon any agent of said railroad by the authorized agent of any town or village aggrieved, shall pay for each and every day it shall neglect, the sum of fifty dollars (\$50.00) to be recovered in an action of debt before any justice of (the) peace, in the name of the People of the State of Illinois, in any town or village aggrieved. Said penalty to be paid to the said town or village for the school fund.”

It is doubtful whether this act applies to any other municipalities than towns and villages, but it is certain that our courts will not compel a railroad company to establish and maintain a station at a point where it can be shown that the expense of its operation will exceed the profits resulting therefrom.

The rule laid down by the courts has been that while a railroad company is vested with broad discretion in the matter of locating and maintaining stations, the public necessity and convenience must be regarded by it. Nor may a railroad company abandon any of its stations unless it is in the interest of its legitimate business with the public.

The time table of the Wabash Railroad shows that Centre avenue is one of the stations on its right of way for the letting on or off of passengers, but the order recites that the station house has been removed.

I am of the opinion that your honorable body has power under the city's charter to make reasonable regulations for the safety and comfort of the public at any point where a railroad company has made it a practice to receive and discharge passengers and freight, provided the interests of

the public require it and it can be done without loss by the company.

Respectfully submitted,
NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

OCTOBER 9, 1912.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Upon receipt of your communication of the 4th inst. in regard to government liquor licenses for buffet flats, I called at the office of the United States Internal Revenue Collector, and in the absence of the collector, interviewed his chief deputy, who informed me as follows:

When a person is engaged in or intends to engage in the business or occupation of a retail liquor dealer or a retail malt liquor dealer, he is required to fill out, sign and swear to a so-called "Return of Special Tax Payer," a copy of which return is transmitted herewith, in which he declares his name, that he is engaged or intends to engage in the business or occupation of a retail liquor dealer or a retail malt liquor dealer, as the case may be, on premises described by street and number. Upon the payment of the special tax—which is at the rate of \$25.00 a year beginning July 1st of each year for retail liquor dealers (less than five gallons) and \$20.00 for retail malt liquor dealers (less than five gallons)—a special tax receipt, which is popularly called a "Government Liquor License" is issued. This special tax receipt is not a license but is merely a receipt showing the payment of the special tax for the period therein mentioned. This special tax is exacted from all persons who engage in the business of a retail liquor dealer or a retail malt liquor dealer. No inquiry is made as to the character or reputation of the person to whom the receipt is issued nor of the place at which the business is to be carried on. The location is ordinarily described both in the return and in the special tax receipt

merely by street and number; but if the person to whom the receipt is issued desires, the location is more particularly described. The government rules and regulations forbid the giving out of any information concerning the business of the Internal Revenue Department except such as appears upon the public records of the office. A public record is kept showing the names alphabetically arranged, location, occupation (retail liquor dealer or retail malt liquor dealer), date of payment of the special tax and date of issuance of the special tax receipt. This record is open to the public. The government regulations and rules will not permit the government officials to notify the Police Department of the issuance of the special tax receipts for liquor dealers in apartments or buffet flats, but the office of the Collector of Internal Revenue will gladly assist the Police Department or any representative of the city in any inspection that they may desire to make of the public record book above referred to.

BRYAN Y. CRAIG,

Yours respectfully,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

OCTOBER 9, 1912.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

I hand you herewith draft of Forest Preserve Act prepared with a view of avoiding the unconstitutional features of the former act as pointed out by our Supreme Court in the case of *People v. Rinaker*, 252 Ill. 256.

The chief points of criticism of the court of the former act were:

First. There was no requirement in the statute that a forest preserve district must embrace a forest, leaving it open to grave doubt as to whether it did not authorize a district in the prairie without any forest whatever in it.

Second. That the former act was highly discriminative and unequal in its operation.

As a corollary of the last mentioned point, the court decided that the act was violative of Section 22, Article IV of the Constitution of 1870, which prohibits the passage of any local or special law granting special privileges or immunities "to any corporation, association or individual."

It was claimed by the opponents of the act that its terms only permitted the organization of but one forest district in a county and when such district was organized the power to organize was exhausted.

The court say:

"Clearly, that would be granting a special privilege and franchise to be enjoyed by the citizens of the locality who were first in securing the organization of their territory as a district and withholding the same privilege and franchise from others situated under like circumstances."

It was further contended that the act violated Section 13 of Article IV of the Constitution, which provides that no act shall embrace more than one subject and that shall be expressed in the title. The court declining to pass specifically upon this question, as it had held the act invalid on other grounds, discussed this feature, however, and intimated that the provisions of the act allowing the commissioners to designate any or all of the public highways within the district as pleasure driveways and improve and maintain them, was a question of grave doubt as to its constitutionality.

A similar criticism was made upon the portion of the act permitting the erection of buildings in the forest for assembly purposes.

The method pointed out in the act for its adoption upon approval by popular vote, was condemned for the reason that the question of the adoption of the law was submitted to all the voters of Cook County, but the creation of the proposed forest preserve district was not submitted to any of the voters of said county except those residing in the City of Chicago and the Town of Cicero. Consequently, the act was never legally adopted and the creation of the district was never legally submitted to the voters of the territory embraced therein. The ballots voted by the voters of Chicago and

Cicero were for or against the adoption of an act to provide for the creation and management of forest preserve districts * * * and creating under said act a forest preserve district, the boundaries of which to coincide with and comprise the whole of the territory of Cook County, while the ballots voted in the rest of the county were for or against the adoption of an act to provide for the creation and management of forest preserve districts.

With respect to these ballots, the court say:

“It will be seen that the voters in Chicago and the Town of Cicero voted both upon the proposition of adopting the act and creating a forest preserve district with boundaries to coincide with the boundaries of Cook County, while all the rest of the voters of the county voted only upon the proposition of the adoption of the act. *
* *

It seems too plain for argument that a large number of the voters of Cook County having been deprived of the privilege of voting upon the organization of the county into a forest preserve district, the election was illegal and the organization invalid.”

There are other provisions of the former act which have been considered by me, which are not touched upon by the Supreme Court in the *Rinaker* case, *supra*, one of which is that Section 6 of the act provides in part:

“The board of commissioners may lay out, extend, maintain and improve pleasure driveways under the provisions of any law authorizing local improvements by cities or villages now or hereafter in force.”

Section 9 of Article IX of the Constitution of 1870 provides:

“The General Assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special taxation of contiguous property, or otherwise. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes; but such taxes shall be uniform in respect to persons or property, within the jurisdiction of the body imposing the same.”

It will be seen by the foregoing that only cities, towns and villages are authorized to make improvements by special

taxation. The enumeration of those classes of municipal corporations in the constitution excludes all other municipal corporations theretofore or thereafter created by law from making any improvements under the provisions of any law authorizing local improvements by cities, towns or villages.

Wilson v. Board of Trustees et al., 133 Ill. 443.

There is also a possible objection to former Section 1, which provides that upon the filing of a petition by one thousand legal voters, the county judge shall "determine and fix the boundaries of such proposed district as shall to him seem to be to the best interests of all parties concerned."

We think the court might well hold this provision violative of Art. III of the constitution of this state providing that no person or collection of persons, being one of the legislative, executive and judicial departments of the government, shall exercise any power properly belonging to either of the others.

Galesburg v. Hawkinson, 75 Ill. 152.

There it is said:

"Here, however, the inquiry is, what shall the law be, as respects the boundaries of this city; shall it be as designated by the charter, or shall it be as prayed by the petitioners? And the decree of the court is the answer. That decree assumes to be, not a declaration of rights under the law, but the law itself, amending and changing a previous statute, as to the extent of territory over which a particular municipal government shall obtain."

The same principle of law is announced in *Young v. Carey*, 184 Ill. 621 (dissenting opinion), *Whitaker v. Venice*, 150 Ill. 201.

There are some other minor details in the act of 1909 which, although perhaps insufficient in themselves to invalidate the entire act, we have thought should be eliminated.

While it is impossible to guarantee any proposed act, or a draft thereof, against successful attack on constitutional grounds, we are of the opinion that the specific constitutional objections in the former act are eliminated in the draft herewith handed you, and that the other unconstitutional features

contained in the former act and not specifically noticed by the Supreme Court have been satisfactorily met.

For your convenience there is appended hereto a synopsis of the sixteen sections of the Act enclosed.

Respectfully submitted,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

OCTOBER 11, 1912.

HON. JOHN McWEENY, General Superintendent of Police,
Chicago.

Dear Sir:

You call attention to the fact that several fruit vendors on thoroughfares where traffic is very heavy have taken out the windows from the front of their stores and sell their wares to people standing on the sidewalk, and you ask for an opinion as to whether this is a violation of the city ordinances.

Our reply is necessarily general because this is one of those questions where each individual case stands on its own footing.

Where the owner of the store keeps his goods within the building line and remains inside of his place while selling goods, he is strictly within the law, unless his manner of conducting business is such that groups collect on the sidewalk in front of his store. Even in such an event, however, there must be a reasonable exercise of authority and it must be directed toward keeping the sidewalk clear rather than toward interfering with the right of the public to purchase. That is to say, a person has a right to stop on the sidewalk and buy an article, such as a newspaper, or to buy fruit, and no occasion for the exercise of police authority arises if two or three people happen to stop at the same time to purchase; but if a group of half a dozen collects at one time, or if there are more or less persons standing at the same place right along so that it amounts to a continuous obstruction,

then the city authorities are warranted in interfering and requiring of the person who does business in this way that he should keep the walk clear.

The general rule has been stated as follows:

“The right of the public to use the streets for purposes of travel and transportation is the paramount one and that of the abutter to occupy them for other purposes is a permissive and subordinate one.”

28 Cyc. 859;

Brauer v. Balt. Refr. Co., 66 L. R. A. 403.

Under this rule it has been uniformly held that while abutting owners may use the street in any manner not inconsistent with the right of the public, they cannot so use it as to interfere with the convenience of the people. For instance, in the case of *Donovan v. Pennsylvania Company*, 124 Fed. 1016, the court held that public passenger vehicles could stand in front of a depot but that their owners had no right to solicit business on the sidewalk.

Numerous fine distinctions of this kind can be pointed out in the reported decisions, but it would seem that the best way of arriving at a determination of whether it is proper to interfere is to ascertain how many people congregate at one time, or whether an obstruction, though slight, is continuous or nearly so.

If there is such obstruction, the city ordinances may be enforced. The ordinances prohibiting the calling of wares, prohibiting the receiving and delivering of merchandise on sidewalks, forbidding blockades, and others, are applicable. We call attention to Sections 1916, 2008, 2045, 2320, 2321, 2336, 2439, 2469 and 2470 of the Chicago Code of 1911. One or more of these is apt to apply in every instance.

You are no doubt aware that one of these fruit dealers recently undertook to enjoin the police from enforcing the ordinances, and the matter was fully argued in court, where it was held that there could be no judicial interference with the exercise of discretion on the part of the police in such matters.

We recommend that in case there are places where there is a doubt as to whether the ordinance should be enforced,

observation should be made and some photographs taken in order that the police may exhibit same in justification if called upon at any time to take action. With such corroborative evidence it will be possible to be much more strict than if the case depended upon the conflicting testimony that would probably be given in case of prosecutions of this kind.

Yours respectfully,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

OCTOBER 11, 1912.

HON. WILLIAM J. HEALY, Chairman, Committee on Streets and Alleys.

Dear Sir:

Your letter of October 8th, requesting opinion as to whether or not, under the terms of the ordinance granting permission to Marshall Field & Company to maintain vault underneath Washington street now pending before the Council, the grantee could legally defeat the power of the Mayor to revoke the said ordinance at any time in his discretion, received.

Section 2 of the proposed ordinance appearing on page 1472 of Council Proceedings of July 22, 1912, starts with the following sentence:

“The permission and authority herein granted shall cease and determine twenty (20) years from and after the date of the passage of this ordinance, or may be revoked at any time prior thereto by the Mayor in his discretion without the consent of the grantee herein named.”

Our Supreme Court in passing upon the use of space underneath an alley under a permit from the City in the case of *Gregsten et al. v. City of Chicago*, 145 Ill. 451, has held that such a permit and the bond given with it form a contract revocable under the conditions of the same.

No question can arise in regard to the present ordinance as to whether or not the City has sufficient title in Washington street at that point to permit it to charge rent and to lease

it out under such conditions as it may demand, so long as the use is not inconsistent with the public use of the street, as the Supreme Court in 1910 in the case of *Williams v. City of Chicago*, 247 Ill. 240, held that the fee to the streets in the Fort Dearborn Addition (in which the property in question is located) is in the City.

It is purely discretionary with the City authorities whether they will allow Marshall Field & Company to use the space covered by the ordinance and therefore the city may grant the right to use the same under such conditions and burdens as the city authorities may care to impose. The ordinance contains a clause making it revocable at the discretion of the Mayor and if the grantee accepts the ordinance it does so subject to the restrictions and burdens imposed by the terms of the same. By accepting the ordinance the grantee admits the validity and binding force of its terms in regard to revocation.

Launder v. City of Chicago, 111 Ill. 291.

The courts have frequently held that where the licensee or grantee accepts a license or privilege which contains a provision that the Mayor may revoke in his discretion, that provision is binding. Even in a case where the grantee or licensee had a right to the privilege without such a provision attached, he is nevertheless bound by it if he accepts the license with such a qualification.

Wiggins v. City of Chicago, 68 Ill. 372.

Schwuchow v. City of Chicago, 68 Ill. 444.

Malkan v. City of Chicago, 217 Ill. 471.

Harrison v. People ex rel. O'Hare, 124 Ill. App. 519.

25 Cyc. 626 (C).

Marshall Field & Company have no right to use the streets in question except by rights acquired through a contract with the City and the City can grant that right upon such terms as it sees fit.

If Marshall Field & Company accepts the ordinance in its present form there can be no doubt that the privileges

therein granted can be revoked at any time by the Mayor in his discretion.

Respectfully yours,
CRAWFORD ROSS,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

OCTOBER 11, 1912.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

Your communication asking for an opinion as to whether the City of Chicago is liable for accidents occurring in sub-sidewalk space used by the property owner or tenant, has been referred to me.

The law is well settled that the city is liable for injuries sustained by reason of the defective condition of sidewalks, as it is the duty of the city to use ordinary care in keeping sidewalks in a reasonably safe condition even where the sidewalks are originally constructed by private persons.

City of Flora v. Naney, 136 Ill. 45.

Hogan v. City of Chicago, 168 Ill. 551.

City of Bloomington v. Bay, 42 Ill. 503.

The city is bound to see that sidewalks under which vaults or sub-sidewalk spaces are maintained are kept in a safe condition, just as in case of all sidewalks, so that the city is liable for any injuries sustained because of accidents due to a lack of ordinary care in keeping the sidewalk in repair. Thus, the city would be liable for accidents happening to persons who were in the spaces underneath the sidewalk when the accident occurred if the accident is due to the defective condition of the sidewalk itself.

Where, however, accidents occur in sub-sidewalk space which are not due to the defective condition of the sidewalk itself, the city is not liable. The space under the sidewalk is not used for public purposes, but, merely for the private purpose of the tenant or landlord occupying it, and the city

is in no way responsible for the condition of the space other than in so far as it affects the safety of the sidewalk itself.

As a matter of fact, the majority of sub-sidewalk space is in territory where the owner of the abutting property has the right to use it as his own property and without paying compensation to the city for his occupancy of the same and does not interfere with the public use of the street. This principle was laid down in a series of cases cited in 1910, and appearing in Vol. 247 of the Illinois Reports. The leading cases being:

Tacoma Safety Deposit Co. v. City of Chicago, 247 Ill. 192.

Sears v. City of Chicago, 247 Ill. 204.

Even where the city owns the fee of the street and allows the use of the sub-sidewalk space, it has no duty to keep the same in repair, except as to the sidewalk, as the sub-sidewalk space is not used for public travel.

Dillon on Municipal Corporations, Sec. 1699.

I would therefore advise you, that the city is not liable for accidents happening in sub-sidewalk space, unless the same is due to the sidewalk above such space not being properly constructed and kept in repair.

Respectfully submitted,

CRAWFORD ROSS,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

OCTOBER 11, 1912.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

In the report we made to you concerning the work of the Law Department before the Board of Review we called attention to the fact that certain national banks, in scheduling their capital stock for purposes of taxation, claimed that the assessors should deduct the value of the buildings occupied by them from the aggregate of their capital, surplus and undivided profits, as a basis for the valuation of such stock for

taxation, notwithstanding that such banks did not own such real estate; also that we had filed complaints concerning this, which the Board of Review had taken under advisement. Since then, the Board of Review decided to allow credit for the real estate in question, and the valuation were fixed accordingly.

We quote from the law concerning the assessment of bank stocks as follows:

“§ 35. The stockholders of every kind of incorporated bank located within this State, whether such bank has been organized under the banking law of this State, or of the United States, shall be assessed and taxed upon the value of their shares of stock therein, in the county, town, district, village or city where such bank or banking association is located and not elsewhere, whether such stockholders reside in such place or not. The value of such shares of stock for purpose of taxation, shall be ascertained by deducting from the value of all the shares of the capital stock of such bank, the fair cash value of the real estate owned by such bank or banking association situated in the county in which such bank or banking association is located as determined by the assessor. Such shares shall be listed and assessed with regard to the ownership and value thereof as they existed on the first day of April annually, subject, however, to the restriction that taxation of such shares shall not be at a greater rate than is assessed upon any other moneyed capital in the hands of the individual citizens of this State, in the county, town, district, village or city where such bank is located. The shares held in this State, of capital stock of National bank not located in this State, shall not be required to be listed under the provisions of this act.”

Prior to July 1, 1903, there was no provision for deducting the value of real estate. In February, 1903, the Supreme Court, in *Ill. Nat. Bank v. Kinsella*, 201 Ill. 31, held that shares of stock owned by the stockholders were to be assessed at their full cash value to the holders, without deducting the value of real estate belonging to the bank, which was to be assessed against the corporation. The court held this was not double taxation.

The law was immediately thereafter amended, as shown above. Consequently, if a banking corporation actually owns

real estate, the value may be deducted from the aggregate value of the shares in determining their value.

Since National Banks, as well as others, may, under the law, own buildings which they occupy, we would not have raised the point if these banks actually held the property in question. But they do not own either the ground or the buildings in which their banks are located, and yet insist that they are equitably entitled to the reduction.

We have found that, generally speaking, the ground is owned by individuals, who have leased to safety deposit companies. These safety deposit companies put up buildings and run them.

It is claimed by the banks that they own either the stock or the bonds issued by the safety deposit companies, although there seems to be reason for doubting this. In one instance we have information to the effect that the bank building is in entirely different hands. But whether the banks are the *bona fide* owners of the stocks or bonds of these subsidiary companies or not, the fact remains that such stocks or bonds are at best personal property, even if they are owned by the banks, and cannot under the law be deducted from the aggregate value of the capital stock. We contend that these banks do not actually invest their own capital in these buildings, but lend the money of the depositors for the purpose, charging interest thereon just as in the case of all other loans. Any other theory would lead to the absurd conclusion, in at least one case, that the bank has more than its entire capital invested in real estate.

Reducing our contention to figures, we present the following concerning the four largest banks so situated:

	Value of Stock on April 1.	Bd. of Review Valuation.
First National Bank.....	\$22,434,891.32	\$16,900,000.00
Fort Dearborn National Bank. .	2,485,925.13	1,340,000.00
Cont. Com. National Bank....	30,607,949.70	19,049,001.00
Corn Exchange Nat. Bank....	8,794,975.75	5,490,000.00
Totals	\$64,323,741.90	\$42,779,001.00

While there is some real estate that is owned by these banks outside of the buildings in dispute, it is but a small proportion of the amount indicated above as deducted from the total valuations.

You will therefore see that the matter is one of great importance. The purpose of this letter is to present the facts in order that we may ascertain your wishes in regard to testing the correctness of our position in the courts. It is doubtful whether we will be able to force a re-valuation in the case of the First National Bank, since we accepted the assessors' valuation and did not file a complaint, although, if suits are started, we ought to include this with the rest. On the others, however, all our rights are saved, and we are in a position to test the question fully if you consider it advisable to do so.

The method of procedure will be by mandamus, to compel the Board of Review to make a re-valuation. We await your directions before acting in the matter.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

OCTOBER 14, 1912.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

You referred to this department an ordinance regulating Cold Storage Warehouses, passed by the City Council on October 7, 1912 (C. P. 1922-3), and asked to be advised as to its validity. You also turned over certain letters concerning same, among which are protests from the Chicago Board of Trade, Chicago Live Poultry Board, and Booth Fisheries Company.

These protests deal more particularly with the propriety of enacting certain provisions than with the legality of same, but we nevertheless take up the objections urged therein, as well as others that have reached us, so that you may have them before you.

The City Council at one time called for an opinion from the Corporation Counsel, as to the validity of this ordinance. (C. P. Sept. 30, 1912, p. 1849.) By some mistake the matter was overlooked. Consequently this is the first time this department has had occasion to make a study of the provisions of the ordinance in order to determine with certainty whether it would stand the test of validity. Even after the closest scrutiny we are unable to say what a court will do with it, but we point out a way to overcome the doubt.

We find the ordinance weak in two places. The adoption of reasonable rules by the Commissioner of Health, if such rules are to govern the conduct of the class of persons affected by the ordinance, would probably be regarded as a delegation of power not warranted by law, although this would perhaps not be sufficient to invalidate the ordinance. The other weak feature, much more important than this, is the prohibition of the sale of such goods after a certain lapse of time, regardless of their condition. There is danger that this may be held an invasion of the property rights of the owner.

Aside from these doubtful propositions, we call attention to a provision of Section 5, whereby a report is required of the quantities of foodstuffs on hand, but not of the time when they were placed in cold storage, and suggest that the reason for requiring the report as to quantities would become stronger if the age of the goods were likewise reported. We also note that the wording of Section 8, which was amended at the time the ordinance was up for passage may give rise to a question as to whether this section applies to any other than over-kept products. We, therefore, recommend that after the word "and" and before the word "without," in the eighth line thereof, there be inserted the words "it shall be unlawful to sell or offer for sale any food which has been kept in cold storage."

The ordinance in question when first presented to the City Council was an exact copy of the cold storage law of the State of New York, which was enacted in 1911 as a part of the Public Health Law. There were only such changes as were necessary to make it an ordinance instead of a statute

and to give authority to city instead of state officers. The only important amendment made to the original draft is that the time for keeping fish has been limited to six months instead of ten.

We do not understand that the right of the city to legislate generally on the subject has ever been attacked. Under the power to regulate the sale of provisions (Clause 50) to regulate the inspection of same (Clause 53), to make regulations necessary or expedient for the promotion of health (Clause 78), and other grants, the municipality has sufficient authority over the subject-matter to enact an ordinance of this character. Such statutes and ordinances have been upheld as a proper exercise of the police power.

Freund on Police Power, Sec. 297.

North Am. Cold Storage Co. v. City of Chicago, 211 U. S. 306.

We will, therefore, take up the objections urged in detail in order to determine whether this power would be unlawfully exercised in the proposed ordinance, and then again take up the main defect noted.

The first objection made by the attorney representing the cold storage interests before the Committee on Judiciary, etc., was to the effect that the business of cold storage warehouseman or the business of refrigerating was not expressly defined, and that this would lead to a misapprehension as to the applicability of the ordinance, so that it would hamper a concern even to the extent of interfering with the free use of an ice box.

We do not coincide with this view, because judicial interpretation of the terms used has given them a fixed meaning.

Allen v. Somers, 52 L. R. A. 106.

Stewart v. Atlanta Beef Co., 93 Ga. 12.

It is next contended that the provisions of the ordinance which apply to warehousemen will also apply to the packers of meats, whose products before being placed in cold storage are already under governmental supervision. This interpretation of the ordinance is wrong, for there is nothing in the ordinance which makes it applicable to such a plant unless it is a public warehouse. In the case last cited above it

was held that "doing a cold-storage business" as used in an Act imposing a tax on "all packing houses doing a cold storage business" did not include a packing house which used cold storage for preserving only its own commodities.

At this point it is proper to consider the objection urged by the Chicago Board of Trade. This is to the effect that the ordinance will interfere with the provision trade of the city as it affects warehouses where cured meats and lards are stored. Attention is called to the fact that these products are placed in cold storage under rigid government inspection, that they may be preserved indefinitely and that they come within the purview of this ordinance only by reason of an oversight on the part of the City Council, since these warehousemen stand on a different footing from the regular cold storage warehousemen.

It is further suggested in the protest that if to the exceptions noted in Section 1 were added an exception of "cured meats or meats in process of curing and cooked animal fats," all objection on the part of the Board of Trade would be overcome. It is obvious that there is no legal question involved in this particular, but if it is desirable to except such food products it can be readily done by adding the words requested together with a clause indicating that the exception is made by reason of the inspection of the Federal Government.

It is urged on behalf of the Booth Fisheries Company that the cutting down of the time during which fish may be retained in cold storage will result in depriving the people of a cheap article of food without sufficient cause for making such a limitation. This is also a question of fact rather than one of law, for it cannot be said that the limitation on fish constitutes a discrimination if there is reason for making the distinction.

It is claimed on behalf of the Chicago Live Poultry Board that from \$30,000 to \$35,000 worth of live poultry comes into the city each day, and that this trade would be affected by the ordinance. It is stated that the ordinance is unjust because it prohibits the sale of the commodity after it has been in cold storage for ten months, also that it discriminates in favor of those who operate their own cold storage rooms as against

others who are compelled to use the cold storage facilities of the warehouses.

On the question of discrimination, it will be observed that this institution recognizes the distinction which the ordinance makes between the warehousemen and others, but they go to the extreme in assuming that there is no restriction placed on persons operating a refrigerating or cold storage plant privately.

While the two classes are treated differently in the ordinance, we do not regard the distinction in the light of an illegal discrimination. It operates on all in the same class alike, warehousemen being included within all of its provisions and all other operators of cold storage and refrigerating plants within some of them. The provisions of Sections 1, 4, 7, 8, 9 and 10 apply to both classes.

It cannot be said that there is no reason for drawing the distinctions between warehousemen and others, while so far as the product and its sale is concerned, that is subject to like inspection, marking, and other restrictions whether it comes from one class or the other.

Consequently we are unable to discover an unlawful discrimination, and find no reason for the assertion that the ordinance would result in an unlawful restraint of trade or the building up of a monopoly.

As stated above, we find one feature of the ordinance that is subject to grave doubt. This is the provision prohibiting the sale of a cold storage product after a certain time without further inspection and regardless of its condition.

While the courts have gone very far in upholding laws which tend to the preservation of health, and have even sanctioned the summary seizure of foodstuffs when the proper health officer has condemned them, we are unable to find an adjudicated case where the mere lapse of time, without an inspection and determination of the condition, is held sufficient to deprive the owner of his property rights in same.

It is possible that our courts would hold that the municipality has the right to fix such a limit, on the same theory that it has the right to regulate the source of supply and preliminary treatment of milk and prohibit the sale of any that

does not conform thereto (*People v. Van de Carr*, 199 U. S. 552), but we cannot say that such a decision is likely. There is, in fact, so much doubt on this point, that we feel constrained to recommend a provision for a rigid inspection at the end of the period fixed and an extension for a limited time to be determined on such inspection under strict requirements for a report on same and publicity in its sale.

With such a provision added as we recommend, we are convinced that the ordinance will successfully withstand attack. Without same its validity is uncertain and can only be determined after a test.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

OCTOBER 14, 1912.

MR. JOSEPH F. PEACOCK, City Real Estate Agent.

Dear Sir:

Your request for an opinion in re duty of the City Comptroller to keep in his custody abstracts, deeds and other title papers and leases relating to property owned and used by the Board of Education, the Chicago Public Library or the Municipal Tuberculosis Sanitarium, has been referred to me for reply.

Section 24 of the Chicago Code of 1911 provides as follows:

“* * * He (City Comptroller) shall be the fiscal agent of said city, and as such, shall have charge of all deeds, mortgages, contracts, judgments, notes, bonds, debts and choses in action belonging to said city, except such as are directed by law or ordinance to be deposited elsewhere; and shall possess and carefully preserve all leases of the property of said city.”

I have made an examination of the statutes and ordinances of the City of Chicago, and have found no direction therein giving the Board of Education or the Directors of the Chicago Public Library or the Municipal Tuberculosis Sani-

tarium, power to have the custody of any abstracts, deeds and other title papers or leases relating to property owned or used by the Board of Education, the Chicago Public Library or the Municipal Tuberculosis Sanitarium.

I am of the opinion that the City Comptroller is charged with the custody of the abstracts, deeds and other title papers and leases relating to property owned or used by the Board of Education, the Chicago Public Library or the Municipal Tuberculosis Sanitarium, for the reason that such property belongs to the City of Chicago.

Very truly yours,

LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

OCTOBER 14, 1912.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

In answer to your request for information as to the probable situation which the city will have to face owing to a loss of revenues unless the Supreme Court reverses its attitude on the method to be pursued in fixing the tax rate, we submit the following:

Under the Cities and Villages Act the city is given the right to levy a tax not to exceed 1.2 per cent. exclusive of what is necessary to pay its bonded indebtedness. But this provision for all practical purposes is rendered nugatory by the Juul law, which provides for a *pro rata* reduction of taxes if the total of all taxes, exclusive of state and school building levies exceeds 3 per cent., but fixes a minimum of 1.10 per cent. for the city.

One effect of the Juul law has been to cause all taxing bodies, in anticipation of a reduction, to swell their tax levies, so that a great reduction in rates each year was inevitable. If it were not for the minimum thus fixed the reduction of the city's rate would always have placed it much below 1.10 per cent. Therefore the fixing of this minimum amounted vir-

tually to establishing 1.10 per cent. as the fixed rated of taxation for the city.

Such an interpretation means that every time the people vote to issue bonds, ostensibly to spread the expense of a permanent improvement over a long period of time, they are in effect curtailing their own revenues for present needs.

The taxes for 1911 were extended at the rate of 1.10 per cent., to which was added the rate required for bonded indebtedness—.33 per cent.

Under the construction recently placed on the Juul law by the Supreme Court it will no be possible this year or hereafter to add the rate for bonded indebtedness to the 1.10 per cent. Consequently the loss of revenue, if no relief is obtained, will be the amount levied from year to year for bonded indebtedness.

At the time this decision of the Supreme Court in the case of *People, etc., v. T. St. L. & W. R. R. Co.*, 254 Ill. 472, was announced, a number of railroad companies filed objections in the County Court against the rates extended by the County Clerk for the taxes of 1912. This was after the middle of July, 1912, when most of the taxes of 1911 had already been collected.

Following the decision of the Supreme Court in the above case, the County Court held the objections good as to anything in excess of what was due under this latest construction of the Juul law.

An appeal was prayed in each of these cases by the County Attorney, and one of them, the case of *People ex rel. O'Connell, County Treasurer, etc., v. C. & W. I. R. R. Co.*, was carried to the Supreme Court for a test case. The city law department has participated actively in the work of presenting this appeal, and the other taxing bodies are co-operating. The abstracts and briefs are signed by the attorneys for the County, City, Sanitary District, School Board, Lincoln Park Board and West Park Board. The case will be argued orally at Springfield on October 19th.

In this case it is contended by the appellant that the recent decision of the Supreme Court, in holding that the rates for bonded indebtedness must be included in the aggregate of

rates to be scaled, puts a construction on the Juul law contrary to the intent of the legislature, also that the law itself is unconstitutional. Since the constitutionality of the law has already been attacked from many different angles, it is safe to assume that sooner or later it would be assailed on the points that are now urged against it. Therefore, if it is at any time to be held unconstitutional, it would be best to have it settled, now, at a time when this new construction has upset the budgets of all taxing bodies within the city.

The county attorney has assurances that the case will be considered by the Supreme Court in time for a decision in December before the tax rates are extended.

If the court decides that its latest interpretation of the Juul law is wrong but that the act is constitutional, then the taxes will be extended as they were last year and the difficulties confronting the city will be overcome. If it decides that the law is unconstitutional, there will be sufficient revenue, since then the city will obtain the full amount of its tax levy, or at least such an amount as a rate of 1.2 per cent. plus the levy for bonded indebtedness would produce. If the court upholds the constitutionality of the law and adheres to its latest interpretation, the work of the departments will be seriously crippled for lack of funds, all work on permanent improvements will have to be suspended, and even those projects on which the people have voted and for which they have authorized the issuance of bonds must for a time remain in abeyance, because the issuance of bonds means a cutting down of the revenue for more urgent immediate needs. So drastic a cut of expenses will be necessary that even such work as vitally affects the health and safety of the public will have to be curtailed, such as the prompt collection of garbage, cleaning of streets, sanitary and building inspection, police surveillance and fire protection. It is estimated that the public library will suffer to such an extent as to make it doubtful whether it can be maintained so that it will even measurably serve the public. The revenues available for the tuberculosis sanitarium will also be greatly reduced.

Not only will the municipality be affected in this way as a consequence of the cut in the city's finances, but similar re-

sults will ensue from the cutting of the income of the other taxing bodies which have in charge the maintenance of the schools, the Sanitary canal, the parks and boulevards, the hospitals, courts, distribution of aid, etc.

That the rate of taxation in the City of Chicago has not been excessive under the former interpretation of the law is evidenced by a comparison with that of other cities. The following table is compiled from reports of the Census Bureau:

	Tax Rate per \$1,000 of-actual value.	Percentage of increase over Chicago's Rate.
Cleveland	\$20.14	48.8
Baltimore	18.89	39.1
New York	17.73	31.
Boston	15.05	11.2
Philadelphia	14.66	8.3
Chicago	13.53	

The only large city in which the rate of taxation is slightly lower is St. Louis, due no doubt to the consolidation of the city and county governments.

The certainty which attends the method we have indicated of arriving at the deficiency which will have to be met, is obvious when the figures for 1911 are considered. A *pro rata* reduction would have put the city's rate at .73, to which would have been added a tuberculosis sanitarium tax of .03 and the bonded indebtedness tax of .33. Thus the total was short of 1.10 and would have had to be raised to that minimum. From all figures available at this time the *pro rata* reduction would make the rate much lower this year so that there will be no chance of obtaining a higher rate than 1.10 if the present interpretation of the law is adhered to.

The tax levy ordinance fixed the amount of bonds outstanding on February 19, 1912, at \$31,947,800. The levy for interest and sinking fund on this would have been not more than about \$2,800,000 if there had been a full levy for sinking funds made each year. But owing to the fact that the sinking fund levies had not been kept up for the full amount required, it was necessary to add to the levy this year, bringing the total levy up to \$3,701,682.81. This is the

amount therefore which the city will be short for the year 1912, by reason of the new method of extending the rates, which will not permit the addition of the rate necessary to realize this sum to meet bonded indebtedness. When the City Comptroller was advised on this point he made strenuous efforts to cut the expenses of the city. Although these were reduced to such an extent as to cripple the service in some departments, there is nevertheless bound to be a deficiency.

Notwithstanding the debt statement of the Comptroller on October 11, 1912, showed that the bonded indebtedness had fallen off to \$27,234,800, there is no material reduction in levies for bonded indebtedness in sight, owing to the fact that like additional sinking fund levies will have to be made in 1913 for bonds maturing January 1 and July 1, 1915, unless these bonds are refunded. Besides, there remain unissued about \$8,400,000 of bridge, harbor and bathing beach bonds, of which, unless it is decided to put off the construction work, more or less will soon be issued and which have have to be provided for. Consequently, there is little likelihood of the bond levy falling off materially.

Therefore the city next year will have to face a shortage in revenues equal to that of this year's and besides will have to make up whatever deficiency exists at the end of this year, which is estimated at from \$2,000,000 to \$2,500,000, thus making the total shortage somewhere between \$5,500,000 and \$6,000,000.

While the management of the fiscal affairs of the city belongs to another department, we have no hesitation in saying that such a situation calls for relief either from the Supreme Court or the Legislature. There are some things which can be done which will apparently lessen the deficiency and we call attention to them, but in each instance the proposed measure is either contrary to the expressed will of the people, or is only a matter of putting off the day of reckoning, and in any event, if all are acted on, they will fall far short of overcoming the difficulty.

Such measures as the following have been suggested: Refunding of the maturing bonds, which will only put off a small portion of the deficiency; payment of water bonds from the

water fund, which will delay the extension of the system; withholding the issuance of bridge, harbor and bathing beach bonds, which were voted by the people in the expectation that the improvements would be made; the levy of a street and bridge tax under a new law which was perhaps never intended to apply to this city.

Each of these, if acted on in view of the emergency, will give a small measure of relief, but not enough to cover the deficiency. There is an alternative in the hands of the people. Bonds can be voted for current expenses, but this as above pointed out, will only defer the crisis and make it more acute at some future time.

The above statement covers, in the main, the situation that has been precipitated most unexpectedly, for up to the time of the decision mentioned above there was not the slightest prospect of a shortage in revenue.

We have not gone into trifling details, since they would make no material change in the status.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

OCTOBER 15, 1912.

HON. EUGENE BLOCK, Chairman, Committee on local Transportation.

Dear Sir:

At the meeting of your Committee held on September 25, 1912, you requested an opinion upon the following questions:

First: Can the validity of street railway certificates (popularly called "Mueller Certificates") that may be issued in connection with the contemplated rapid transit subways, be tested without the passage of an ordinance providing for the issuance of such certificates?

We are of the opinion that in order to have a basis for testing the validity of such certificates an ordinance would have to be passed by the City Council providing for the is-

suance of such certificates and the making of a mortgage or deed of trust to secure the payment thereof, and the question of the adoption of such ordinance first submitted to a popular vote and approved by a majority of the qualified voters of the City voting upon such a question at a general, city or special election in and for the entire city coming not sooner than thirty (30) days from and after the passage of such ordinance.

Second: Could the validity of such street railways certificates be tested by the passage of an ordinance providing for a subway on one street, for example Madison street?

- We are of the opinion that an ordinance complete in itself and providing for a subway on one street or a portion thereof and providing for the issuance of street railway certificates and the mortgage or deed of trust to secure the payment thereof would afford a basis for testing the validity of such certificates. A tentative plan for financing the enterprise would have to be determined upon before such an ordinance could be intelligently drafted. The question of the adoption and approval of such ordinance would also have to be submitted to a popular vote. The popular vote upon such question might be materially affected by the fact that the ordinance provided for a subway on only one street or a portion thereof and not for a comprehensive system of subways.

Third: Could an ordinance providing for the issuance of street railway certificates be repealed by the City Council?

We are of the opinion that such an ordinance could be repealed at any time provided none of the certificates therein provided for had been issued, sold or disposed of and no contract had been made or entered into thereunder.

Fourth: Is there any other practical plan for testing the validity of the proposed street railway certificates?

The purpose of a test case would be to determine the validity of the concrete plan which is proposed to be carried into effect. There is therefore in our opinion no practical way of testing the validity of the proposed street railway certificates without the formulation of a concrete plan for the subway and the financing thereof and the passage of an ordinance embodying or based upon such plan and providing as a part thereof for the issuance of street railway certificates

and a mortgage or deed of trust to secure the payment thereof, and the submission to a popular vote of the question of the adoption and approval of such ordinance.

The validity of the act of the legislature, approved May 18, 1903 (popularly called the "Mueller Law") has been questioned in some quarters on the ground (as is claimed) that the journals of the House of Representatives and Senate do not show a compliance with one of the provisions of section 13 of article IV of the Constitution of Illinois, to the effect that every bill and all amendments thereto shall be printed before the vote is taken on its final passage. Cases are now pending in the Supreme Court of this state which involve substantially the same question in respect to other acts of the legislature.

An opinion in one of the cases referred to is expected at the present October term of the Supreme Court.

Yours respectfully,

BRYAN Y. CRAIG,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

OCTOBER 17, 1912.

HON. EUGENE BLOCK, Chairman, Committee on Local Transportation.

Dear Sir:

The opinion of the Law Department has been requested (first) as to the legality of the occupation of the downtown streets by the elevated railroad companies, more particularly Wabash avenue, Lake street, Van Buren street and Fifth avenue, and (second) information as to the status of the so called "Union Loop" litigation.

The elevated railroad companies which are now actively engaged in business in Chicago are the South Side Elevated Railroad Company, the successor of the Chicago & South Side Rapid Transit Railroad Company; Chicago & Oak Park Elevated Railroad Company, formerly known as the Lake Street Elevated Railroad Company; Metropolitan West Side Ele-

vated Railway Company, the successor of the Metropolitan West Side Elevated Railroad Company, and the Northwestern Elevated Railroad Company.

The South Side Elevated Railroad Company received its grant from the city in an ordinance passed March 26, 1888, and accepted May 24, 1888. This ordinance granted to the Chicago & South Side Rapid Transit Railroad Company permission and authority to construct, maintain and operate for a period of fifty years an elevated railroad with two or more tracks, not exceeding three, and requisite appliances, along a route in the City of Chicago beginning at the north line of Van Buren street between Dearborn street and Wabash avenue and running thence southwardly between Dearborn street and Wabash avenue to a point between the north line of Thirty-seventh street and the south line of Thirty-ninth street, thence eastwardly or southeastwardly to a point to be selected by said company between Dearborn street on the west and Forest avenue on the east, crossing the city limits at this latter point. This ordinance was amended by another ordinance passed April 2, 1891, and accepted April 11, 1891, which changed the route south of Thirty-seventh street and authorized certain branches. A further amendatory ordinance was passed April 7, 1892, and accepted April 18, 1892. This latter ordinance referred only to a portion of the railroad on Sixty-third street.

Bonds were issued to aid in the construction of the railroad authorized by these ordinances, and to secure the payment of bonds a mortgage on the property and franchise was executed, which was afterwards foreclosed. The property was purchased at the foreclosure sale by Leslie Carter and his associate, and afterward was by them transferred to the South Side Elevated Railroad Company.

The Metropolitan West Side Elevated Railway Company is operating under a grant to the Metropolitan West Side Elevated Railroad Company passed April 7, 1892, and accepted April 16, 1892, and under various subsequent ordinances granting extensions. The ordinance of April 7, 1892, gave to the Metropolitan West Side Elevated Railroad Company permission and authority to construct, maintain and operate for

a period of fifty years an elevated railroad with two or more, but not exceeding four tracks, from the east line of Fifth avenue between Jackson street and West Congress street extended, west across the Chicago River to Sacramento avenue, and from there in a westerly direction to the city limits, with three branches.

The Metropolitan West Side Elevated Railroad Company issued bonds in aid of the construction of its railroad, and to secure the payment of the same executed a mortgage on its property and franchise. This mortgage was afterward foreclosed and the property purchased at the foreclosure sale by Frederick P. Olcott, trustee, who afterward conveyed to the Metropolitan West Side Elevated Railway Company.

The Chicago & Oak Park Elevated Railroad Company, which was formerly known as the Lake Street Elevated Railroad Company, is operating under two ordinances, both passed November 24, 1890, and accepted December 24, 1890, granting to the Lake Street Elevated Railway Company permission and authority to build, construct and maintain an elevated railroad with a double track on Lake street from the west line of Canal street to Crawford avenue and from Crawford avenue west to the city limits; the latter ordinance also granted the right to construct a railroad from the west line of Canal street to the east line of Market street. These ordinances were assigned to the Lake Street Elevated Railroad Company August 30, 1892, and thereafter accepted by the assignee company. May 15, 1893, an ordinance was passed granting to the Lake Street Elevated Railroad Company the right to build a branch along Market street to the south line of Madison street and also other branches which have not been built. The name of the Lake Street Elevated Railroad Company was afterward changed to the Chicago & Oak Park Elevated Railroad Company.

The Northwestern Elevated Railroad Company is now operating under an ordinance passed by the City Council January 8, 1894, and accepted January 13, 1894. This ordinance gave permission and authority to the Northwestern Elevated Railroad Company to construct, maintain and operate, for a period of fifty years, an elevated railroad with branches

and with two or more tracks, not exceeding four, with necessary appliances from Monroe street or from a street or point north of Monroe street between Wabash avenue and Market street in a northerly or northwesterly direction to the city limits with five different branches therein specified. Other ordinances granting the right to extend to Ravenswood and to extend its line on North Water street from Wells to North Clark street have been recently passed. In addition to owning and operating its main line from the central part of the city to Wilson avenue and thence over the Chicago, Milwaukee & St. Paul Railway Company's tracks to Evanston, the Northwestern Elevated Railroad Company now owns the "Union Loop."

The Union Loop was constructed under four different ordinances; the first ordinance was one granting to the Lake Street Elevated Railroad Company the right to construct, maintain and operate an elevated railroad with two tracks on Lake street from the east line of Market street extended, to the east line of Wabash avenue. This ordinance was passed October 1, 1894, and accepted October 3, 1894. The ordinance provided that the railroad should be used exclusively for passenger traffic and the mails; that the trains should be regularly and systematically run at such intervals as would accommodate the public and the number of trains and the frequency should be increased as the demands of the public should render necessary and the increased traffic warrant.

The next loop ordinance was an ordinance granted to the Northwestern Elevated Railroad Company, passed June 24, 1895, and accepted August 19, 1895. This ordinance was, in terms, an ordinance amendatory of the ordinance passed January 8, 1894. It gave authority to the Northwestern Elevated Railroad Company to operate its railroad and branches with two tracks and necessary appliances on Fifth avenue from the Chicago River south to the north line of Harrison street. It was provided in and by the ordinance that the portion of the railroad south of Lake street should be subject to the joint use of the Northwestern, Lake Street, Metropolitan, South Side and Union Elevated Railroad Companies, "under any and all contracts now existing or which may hereafter be en-

tered into between the said companies or any of them," and also provided the Fifth avenue side of the loop should be by the Northwestern Elevated Railroad Company leased to, constructed and maintained by the Union Elevated Railroad Company for the joint use of the companies mentioned. The provision of the ordinance of January 8, 1894, which made the grant conditional on the road carrying passengers and mails exclusively apply to this grant, so also the provision requiring the service to be adequate to public demands and increase of traffic. Upon the passage of this ordinance the Mayor refused to approve it unless the Northwestern Elevated Railroad Company would enter into an agreement in consideration of the approval by the Mayor of the ordinance under which agreement the company would rebuild and enlarge the Wells street bridge, and maintain and repair it thereafter, and under which it agreed to pay into the city treasury all car licenses and other payments provided in the ordinance of January 8, 1894; that it should light all street and alley crossings south of the Chicago River, and other provisions which need not now be mentioned. This agreement was executed by the company and the Mayor approved the ordinance.

The next loop grant was a grant made to the Union Elevated Railroad Company by ordinance passed October 14, 1895, and accepted October 21, 1895. This ordinance gave to the Union Elevated Railroad Company permission and authority to construct and maintain an elevated loop for the period of fifty years on Wabash avenue from the north line of Lake street to the south line of Harrison street, with the right to connect and operate in connection with the elevated railroad on Lake street, and also with the South Side Rapid Transit Railroad Company. It is provided by this ordinance that the railroad should be used for handling passenger traffic and the mails exclusively, and that all trains be regularly and systematically moved as should be necessary to accommodate the public, and the number of all trains should be increased as rapidly as the demands of the public should make necessary, and the increase of traffic warrant.

The next loop grant was a grant to the Union Consolidated Elevated Railway Company made by ordinance passed

June 29, 1896, and accepted July 6, 1896. This ordinance gave permission and authority to construct and maintain, for a period of fifty years, an elevated railroad on Van Buren street from Wabash avenue, connecting at that point with the tracks of the Union Elevated Railroad Company, thence west along Van Buren street to a point two hundred feet east of Halsted street connecting with the tracks of the Metropolitan West Side Elevated Railroad Company with a branch on Market street, and with the right to connect with the tracks of the Union Elevated Railroad Company on Fifth avenue "for the operation of the Loop System." This ordinance provided that the road should be used for passengers and the mails exclusively, and for violation of this provision the grant becomes "null and void."

It is provided that the part of the elevated structure between Wabash avenue and Fifth avenue should be subject to the joint use of the Northwestern, Lake Street, Metropolitan, South Side and Union Companies, "upon such terms and conditions as may have been agreed upon in any and all contracts now existing, * * * or such contract or contracts as may hereafter be entered into between the said companies, or any of them, for the use and operation of the said railroad." It is provided, also, that the grantee should run its trains throughout the night at regular intervals of not more than thirty minutes; that all trains should be regularly and systematically moved and the number of trains should increase with the increased demands of the public. This ordinance the Mayor was unwilling to sign without additional stipulations on the part of the company and the payment by the company to the city of a certain amount of the gross receipts of the company. Whereupon a contract or agreement supplemental to the ordinance was executed by the Union Consolidated Elevated Railroad Company and by the Union Elevated Railroad Company. It provided, among other things, for the payment to the city by whoever should control and operate the loop line of certain percentages of the gross receipts ranging from five per cent. from 1897 to 1901, to twenty-five per cent. from 1901 to the end of the term, providing that in case there was a default in the payment continuing

for thirty days all rights and privileges under the ordinance should thereupon absolutely cease and determine at the election of said city." The agreement provided also that the loop line was to include all of the elevated structure on Wabash avenue, Van Buren street, Lake street and Fifth avenue as it now exists.

October 20, 1903, the Northwestern Elevated Railroad Company filed a bill against the City of Chicago and the Commissioner of Public Works to enjoin the City and the Commissioner from interfering with the extension of loop platforms on Fifth avenue, Van Buren street and Wabash avenue. The extension of these platforms had been begun by the complainant under permit issued by the Commissioner of Public Works.

Briefly, the bill sets up the various loop ordinances, and avers that the Northwestern Elevated Railroad Company has succeeded to the rights, privileges and franchises of all the other loop companies. The bill then alleges the building and construction of the Union Loop, and that it is necessary, because of the increase in traffic, to extend the loop platforms; that it obtained a permit so to do from the Commissioner of Public Works, which was afterward revoked.

The prayer is for a decree finding the right in the complainant, under the ordinances set up in the bill, to extend its platforms; that the revocation of the permit be declared void, and that the City and Commissioner of Public Works be enjoined from interfering with the extension of the platforms.

The Commissioner of Public Works filed an answer admitting the passage of the ordinance and the issuance of the permit, and alleging that the permit had been issued under a misapprehension, and upon learning the fact that the lengthening of the platforms would unnecessarily impair the usefulness of the streets he revoked the permit. The city at first demurred to the bill, but afterward, upon leave of court, withdrew the demurrer and filed an answer. The answer sets up the invalidity of the loop ordinances, because the City Council did not have jurisdiction to pass them, for the reason that a sufficient petition of the majority of owners of frontage on

the various loop streets was not presented; that, although the elevated railroad companies to which loop grants were made are organized under the General Railroad law of the State, they are, nevertheless, subject to certain provisions of the Horse and Dummy Act, and that no notices of the presentation of the petitions asking for the various grants were published in accordance with the provisions of Section 3 of the Horse and Dummy Act.

The answer further sets up that the city had no power to grant authority to the railroads to erect stations in the public streets to be used for commercial purposes. It is also alleged that the railroads have not built their lines between the termini fixed in the various ordinances.

The city also filed a cross bill on December 17, 1903, which later was amended, and the amended and supplemental cross bill was filed on June 29, 1906. This cross bill sets up in detail and at length the points raised in the city's answer, and attacks the rights of the companies to maintain the loop, upon the grounds set up in the answer. To this amended cross bill demurrers were filed by the South Side Elevated Railroad Company, Union Consolidated Elevated Railroad Company, Central Trust Company, George Sherman, Illinois Trust & Savings Bank, Northern Trust Company, American Trust & Savings Bank, Metropolitan West Side Elevated Railroad Company, Union Elevated Railroad Company and the Chicago & Oak Park Elevated Railroad Company. These demurrers have not been disposed of.

The Northwestern Elevated Railroad Company filed two pleas to a portion of the amended and supplemental cross bill of the city, and demurred to the balance. The first plea is a plea of *res adjudicata*. The plea sets up the bill filed against the city, and others, by Rothschild & Company, to enjoin interference by the defendants with the platform connection from the Rothschild store to the loop line on Van Buren street, near State street. In their answer to this bill the City of Chicago, the Mayor and the Commissioner of Public Works, among other averments, "admit that said several ordinances * * * are and were valid contracts between the said corporations and the City of Chicago" (referring to the several "loop"

ordinances). The decree in the case, as set up in the plea, finds that the ordinance of January 8, 1904, to the Northwestern Elevated Railroad Company, the ordinance of June 29, 1896, to the Union Consolidated Elevated Railroad Company, the ordinance of October 1, 1894, to the Lake Street Elevated Railroad Company, the ordinance of June 24, 1895, to the Northwestern Elevated Railroad Company and the ordinance of October 14, 1895, to the Union Elevated Railroad Company (the last four of which ordinances are "loop" ordinances) were duly passed and accepted "and were * * * and are now in full force and effect." This decree enjoined the city and the other defendants from interfering with the Rothschild station platform, and it was finally affirmed by the Supreme Court.

Rothschild & Company v. City of Chicago, 227 Ill. 205.

The second plea is a plea of estoppel. This plea sets up the various contracts and agreements between the elevated railroads, and the various leases which have been executed. It then sets up payments to the City of Chicago from 1898 to 1906, aggregating to \$181,028.50. It further sets up many ordinances, orders, permits and communications from the Mayor and the Corporation Counsel affecting, referring to, or recognizing the existence of the loop or the loop grants. The plea also alleges the expenditure by the Northwestern Elevated Railroad Company, and its predecessor loop companies, of large sums of money upon the faith of the validity of these franchises, the issuing of bonds and the sale of these bonds to innocent holders for value.

Certain intervening property holders constituting the so-called Loop Protective Association also filed a cross bill setting up practically the same things as are contained in the city's cross bill.

December 21, 1903, the motion of the Northwestern Elevated Railroad Company for a preliminary injunction came up before Judge Tuley, and on February 8th he rendered an opinion in which he states that, inasmuch as the grant was for an obstruction above the level of the street, the Council must have intended to limit the grant to erect platforms and the like to the original construction; that after the companies

had constructed their platforms in the first instance nobody except the City Council had authority to grant to the companies the right to extend their platform, and on February 25, 1904, an order was duly entered denying the preliminary injunction.

Since the entry of the order allowing the city to file an amended and supplemental cross bill on June 29, 1906, the so-called Loop Protective Association had been dismissed out of the case upon the motion of the complainant and against the objections of the association. This association, however, still maintains legal counsel for the purpose of looking after and protecting the interests of property owners along the line of the elevated railroad in the loop.

The present status of the suit is that the matter is pending upon bill, amended and supplemental cross bill thereto, answer of the city, in the Circuit Court and has been reached on the first call before his Honor Judge Mangan and continued until November for trial. There remain, however, before the case can be put to issue preliminary questions involving the sufficiency of the pleas filed by the complainant. The decisions of the court upon the sufficiency of these pleas will probably necessitate some amendments to either the bill or cross bill in accordance with whether the decision is in favor of the city's contentions or against them.

It is possible that a final decree might be rendered upon the decision disposing of the pleas and if this is done an appeal can be perfected to the Appellate Court from such decision.

Yours respectfully,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

OCTOBER 23, 1912.

HON. JOHN R. EMERSON, Chairman, Special Vice Commission.

Dear Sir:

In reply to your request of October 18th, we beg to advise you that either your committee or the City Council is at liberty to recommend to the legislature the enactment of any law that it may deem best adapted to remedy the social evil, which is the subject matter of your investigation.

It may be well in the incipency of your investigation to advise your committee in a general way concerning the functions of the legislature on the one hand, and the City Council on the other, relative to the enactment of laws or ordinances touching the subject in question.

Primarily, the legislature is invested with all power not specifically withdrawn from it by the constitution.

The legislature has found that, as to many subjects, it could not enact a general law which would be adaptable to multifarious conditions of a conflicting nature arising in different localities. The legislature, therefore, has seen fit to create numerous subsidiary governing bodies, designated in the statute as cities and villages, and has conferred upon these cities and villages certain of its legislative functions, and in so doing the legislature has reserved to itself the exclusive right to legislate on some subjects, but in no instances, except those provided by the constitution, has it conferred upon municipalities the exclusive right to legislate on any subject.

It is a familiar rule of law, so firmly established that it does not admit of dispute, that any municipal legislation which may be enacted must be in consonance with any laws touching the same subject matter which have been enacted by the state legislature, and that when state legislation and municipal legislation are in conflict the municipal legislation must give way to state legislation. On the other hand, it is also a familiar rule of law that when municipal legislation is authorized and not in conflict with state legislation, it is as effective within the confines of the municipality enacting it as is a law passed by the state legislature.

There are at present a number of laws on the statute

books making the social evil in question a crime. So long, therefore, as those laws continue in force, no municipality could pass an ordinance that could in any wise legitimize that social evil. We are, however, of the opinion that, notwithstanding the existence of the laws above referred to, the City might make it an offense to indulge in certain practices, except in certain localities which should be prescribed by the ordinance, irrespective of the fact that the said statute branded this identical practice as a crime and punished them accordingly. In fact, we have in mind a case decided by the Supreme Court of this State where an ordinance made it an offense to gamble on horse races except in certain defined localities. It was contended that the ordinance was invalid because it conflicted with the state law on the subject and tended to make legitimate that which the statute had branded illegitimate, but the Supreme Court held that the ordinance did not legitimize gambling in the localities mentioned in the ordinance and that it only imposed a penalty in addition to that prescribed by the statute if the statutory offense were committed in places other than those designated in the ordinance; that gambling on horse races in the defined localities was a statutory offense notwithstanding the ordinance, but that gambling on horse races outside of the places designated by the ordinance was a violation of both the statute and the ordinance.

The legislature of this State has enacted legislation prohibiting a municipality to license the social evil in question, and if the City of Chicago were to be permitted to license the subject in question, it would necessitate the repeal of the statute prohibiting such licensing.

We are of the opinion that before any broad powers relative to the subject in question could be conferred upon the City of Chicago, it would be necessary that the legislature modify, by statutory amendments, the policy of the state with reference to the subject.

We have no doubt that if the legislature, in its wisdom, sees fit to make sweeping changes and render legitimate that which it has heretofore pronounced illegitimate, that it has plenary power so to do, and that in enacting such legislation, it may confer upon municipalities power to pass ordinances

regulating the subject, and may, if it sees fit, provide by statute that before those ordinances become effective they must be approved by popular vote.

In so far as the powers of your committee are concerned, they are measured by the resolution authorizing the appointment of the committee, and even if the Council had power to authorize the committee to issue subpoenas and administer oaths to witnesses, it has not done so.

Your committee, therefore, is in a position where it must request of a witness his attendance, but cannot command it, and in hearing the testimony of witnesses who do attend, your committee must be content with their unsworn statements as it is without power to administer oaths.

Very truly yours,

CHAS. M. HAFT,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

OCTOBER 23, 1912.

HON. HARMON N. CAMPBELL, President, Civil Service Commission.

Dear Sir:

The Civil Service Commission has requested the opinion of this department concerning an examination to be held for the position of Chief Engineer, Board of Education, and has subsequently submitted a review of the growth of the engineering service of the Board as well as a call for the examinations ordered and a classification of duties for the four positions in branch "B" of the service. You ask that an opinion be given "as to whether or not the attitude and action of the Commission in this matter are the correct ones, and if not, advise us what our course should be."

The published notice is as follows:

EXAMINATION ORDERED.

Original Entrance.

Chief Engineer (Board of Education), Class E, Branch B, Grade III, \$6,000 * * * Oct. 15. Subjects of Examination: Special subject, experience, arithmetic and report. Duties: Directs engineering work in design, installation and construction of lighting, heating, ventilating, plumbing, sanitary and electrical apparatus in school buildings and in the preparation of estimates and specifications therefor; has charge of the operation and maintenance of mechanical appliances in schools, and general care and janitor work in school buildings.

PROMOTION.

Chief Engineer (Board of Education), Class E, Branch B, Grade III, \$6,000 * * * Oct. 15. Subjects of Examination: Duties, arithmetic, report, efficiency, seniority. Eligible: Persons employed in the same line and character of work who have legal standing in the next lower rank or grade in Branch B, Operating Engineering Service and who have served in such rank or grade by actual employment for at least five years and are at the time of this examination actually employed as indicated above in the Board of Education, or are on leave of absence or are eligible for reinstatement."

The classification of duties is as follows:

"School Engineer, Class E-b, Grade 1, Board of Education. Number of positions, 283.

Specific duties: Has charge of operation and care of heating, ventilating, sanitary and electrical apparatus in school; is responsible for the cleaning and general care of the buildings and grounds of a school, and hires and pays out of his salary appropriation all janitors and helpers needed.

Supervising Engineer, Class E-b, Grade II, Board of Education. No. of position, 8.

Specific Duties:

(a) Inspects and supervises installation or remodeling of heating, ventilating, plumbing, sanitary and electrical apparatus in all the school buildings in an assigned district.

(b) Tests, inspects and reports on necessary repairs to heating, ventilating, plumbing, sanitary and electrical apparatus, and instructs school engineers in the operation of same; checks bills for completed work

and operates appliances in any school in case of emergency.

Asst. Chief Engineer, Class E-b, Grade III. Board of Education. No. positions, 1.

Specific Duties: Has charge, under the direction of the Chief Engineer, of all engineering work in the design, installation or construction, of lighting, heating, ventilating, plumbing, sanitary, and electrical apparatus in school buildings, and preparation of estimates and specifications therefor. Has charge, under his superior, of the operation and maintenance of the mechanical appliances in schools and the general care and janitor work of school buildings.

Chief Engineer, Class E-b, Grade III. Board of Education. No. of positions, 1.

Specific Duties: Directs all engineering work in design, installation and construction of lighting, heating, ventilating, plumbing, sanitary and electrical apparatus in school buildings, and in the preparation of estimates and specifications therefor. Has responsible charge of the operation and maintenance of all the mechanical appliances in schools and the general care and janitor work of school buildings."

A subsequent notice provides:

"Ordered, That the call for original and promotion examinations advertised to be held October 30, 1912, be and the same is hereby cancelled, and the Secretary is hereby instructed to re-advertise said examinations without limitation as to time of service as a requirement for eligibility for the promotion examination."

The Civil Service Commission desires an opinion as to whether the following method herein below described of calling for and holding an examination for the position of chief engineer is in accordance with law.

For many years Thomas J. Waters, who was originally an operating engineer, held the position of chief engineer, and under him were certain supervising engineers in charge of districts, as well as an assistant chief engineer. The latter's civil service standing was that of draftsman and he was advanced from time to time out of his grade, without examination, until he attained the position of assistant chief engineer which he now holds. The same is true in a measure of the supervising engineers.

On the death of Waters, 1909, a promotion examination

was called by the Civil Service Commission and all old 10th grade operating school engineers were held eligible, neither the assistant chief engineer nor any of the supervising engineers having obtained their position through promotion.

No one passed this examination and an original entrance examination was called. One Bryan passed first and one Allen passed second. At the request of Bryan the certification was withheld until November 28, 1910. Bryan died a few days later and the position of chief engineer has not since been permanently filled.

Prior to 1909 the rules of the Commission classified the position and place of employment under section 3 of the Act upon a salary basis. Section 5 of Rule I of the rules of 1909 provided that duties should determine the class of service and division of any particular position. No attempt was made at that time to apply a "duties" standard as a matter of classification and grading.

Grade 10 operating engineers, carried a salary of \$3,000 and above. The operating engineers were selected by civil service before changes in compensation by appropriation for individuals were made from time to time which resulted in the greater portion of the school engineers being out of grade.

In 1909 and 1910 the Commission proceeded to classify position upon a "duties" rather than a "salary" basis. The new classification and grading became effective by the rules of April 5, 1911. The service was divided according to the line and character of the employment as to divisions and to a certain extent the divisions were subdivided into grades based upon duty and responsibility. Under these rules Division "E" was made the operating engineers service. Branch "a" thereof included operating engineers other than those of the Board of Education. Branch "b" included the engineers in the service of the Board of Education. Branch "b" was divided into three grades, Grade I school engineers, Grade II supervising engineers, and Grade III chief engineer and assistant chief engineer.

The school engineers' association has made certain agreements in regard to the new classification which are stated in the communication from your Commission above referred to,

the purport of which is not now necessary to inquire into, further than to say that the assent of the association was had to the division of Branch "b" of the operating engineers service into three grades and the division of the two lower grades into salary groups. Grade I, school engineers, has four groups.

Group D—Salary less than \$2,100.

Group C—Salary between \$2,100 and \$2,500.

Group B—Salary between \$2,500 and \$3,000.

Group A—Salary more than \$3,000.

Grade II, supervising engineers, carried three salary groups ranging from \$2,040 to \$2,520.

There are eight supervising engineers in the service who, provided they have a civil service status, namely, have obtained their position through promotional examinations, would be the only ones eligible to take the examination for Chief Engineer.

The Assistant Chief Engineer being in the same grade as the Chief Engineer, is eligible to appointment to the position of Chief without promotional examination, provided of course, that he is holding his position under the civil service law through a promotional examination, but as hereinbefore stated, the present Assistant Chief Engineer is out of grade and consequently not eligible to appointment.

With respect to the supervising engineers who would be eligible for the examination, the facts are that none of these eight supervisors have obtained legal standing as supervising engineers and all but two of them had legal standing in grades in the operating engineering service lower than old 10th grade. Therefore, none of the persons occupying the next lower rank or grade to Chief Engineer is eligible for examination. The rank exists but no one is occupying a position therein.

The scope of the examination to be held has hereinabove been indicated in the notice for the examination which it will be observed calls for both an original entrance and a promotional examination.

The supervising engineers in Grade II who are candidates for the position of Chief Engineer will be debarred from

taking a promotional examination because of the fact that none of them have a civil service status, never having passed a promotional examination for supervising engineers. We understand that as soon as your Commission has ascertained from the registry lists that none of the candidates from Grade II are eligible by reason of their lack of civil service status, it is then proposed to throw open the examination to all citizens of Chicago under the statutory limitations. This course, perhaps, might be regarded as one of policy concerning which any observations from this department would be out of place and uncalled for. We bear in mind, however, that your communication requests us to give you an opinion as to what your course should be if we find that your proposed action is not correct. The phraseology of this request leads us to assume that a reply is desired not merely categorical in form and addressed to the sole question of whether in case there are no applicants competent to take a promotional examination from Grade II to Grade III an open examination should be called, but touching upon the broader question of whether the entire course to be pursued by your Board is one consonant with sound civil service policy and the spirit of the law. We are guided in what is hereinafter said to a very large extent by the language used by our Supreme Court in the case of *People v. Errant*, 229 Ill., page 56, wherein this is said:

“* * * The first and most important object to be accomplished by a system of civil service is to increase the efficiency of the service. This is a worthy purpose and one that appeals to the good sense and sober judgment of thoughtful men. To accomplish this great purpose the Civil Service law seeks to remove the service to which it applies from the domain of party politics and readjust it on a common sense, business basis, placing before the officer or employe every possible inducement to render faithful and conscientious service. Among the means devised to secure the highest degree of efficiency are the assurance that the employe is not in danger of being swept from his place by an unfavorable turn of the political wind, and that faithful, honest and efficient service in one position will open up possibilities for future promotion to a better one.”

The position of Chief Engineer of the School Board is a

high one; in fact, from the consideration both of salary and duties, one of the highest in the city service. There can be no question that the possibility of promotion to this position would be a powerful stimulus to industrious, faithful and efficient service on the part of employes to whom the gateway to this position might be open through a promotional examination. In the next rank to that in which this high position exists there appear to be no eligible candidates. Does this not warrant a change in what might appear to be the logical method of filling the position and authorize the throwing open the examination to such position to residents of Chicago generally? It would seem the reasonable and logical method to be pursued in order to give full expression to the civil service idea that before Grade III be filled under the present circumstances, Grade II be comprised of employes of civil service status. To put it differently: that Grade II be first filled with eligible civil service men who have entered such grade through proper promotional examination, and thereafter that Grade III be filled by a promotional examination open to those of the next lower rank (Grade II) desiring to submit themselves to such examination. In other words, that the foundations be laid first and the cap-stone be added after these and the courses resting thereon have been completed—or in other words, building up from the bottom instead of down from the top. It can scarcely be that the idea of advancement or promotion will be presented to the municipal employe in very alluring form if after years of service in the intermediate grades and at last in sight of the higher and more honorable positions, his chances of securing these positions are materially interfered with and hampered by opening up such positions to the citizens at large of Chicago instead of restricting them to those of the next lower grade.

Nothing herein contained is intended to convey the notion that in cases where it is impracticable to fill the higher position from the next lower grade an open examination may not be held; but as has been well said by our Supreme Court in the *Errant* case, *supra*:

“* * * the determination of appellees that it was not practicable to fill the place by promotion should not pre-

cede but come after a promotional examination for the position to be filled."

From a study of the duties set out in the list of duties before us we confess we are unable to see such a difference between the duties of Grade II and Grade III as would *per se* render an employe in Grade II incompetent to take an examination for Chief Engineer. The duties seem to be in the same line with the difference that those of Grade III are of a higher grade than those of Grade II, but are not such but that an employe of Grade II familiar with the duties of that grade could readily fit himself through experience, observation and study to pass an examination involving a knowledge of the duties of Grade III. We apprehend that it would be thought, in the event of the matter being taken into court and the question being put to the Commission, why Grade III had not been filled by an examination from Grade II, but a sorry answer for the Commission to say that it was because Grade II was filled with ineligible persons and those not rightfully belonging therein. If Grade II is not filled with persons having a proper civil service standing, it strikes us that then it is the duty of the Commission to at once fill it with persons having a legal status in that grade. This having been done, the filling of the position of Chief Engineer by promotional examination from the next lower grade will easily and logically follow. While it may be said that this procedure involves considerable delay, yet such delay can hardly be off-set against the advantages of having the position of Chief Engineer properly filled (as we think) from the next lower rank instead of having recourse to the Caesarian method of filling a position by an open examination where a promotional one is proper. We are, therefore, of the opinion upon this branch of the case that, other things being equal and there being no impracticability in filling the Third grade from the Second grade (provided the Second grade itself is properly constituted) that this position should be filled by promotion rather than by an open examination.

You propose, according to the notice, to call both registration for promotional examination and application for original entrance examination in one of the same notice. I can

see no objection to this provided all who present themselves for promotional examination are notified that if found eligible for promotional examination they will thereafter be permitted to file application for original entrance examination. In other words, the fact of publishing two classes of examination in one notice must not preclude those registering for promotional examination from later making application for original entrance examination, if such examination be held. The above, however, must be taken in connection with the expressions we have hereinabove made concerning the impropriety, in our judgment, of an original examination for this position.

Yours respectfully,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

OCTOBER 23, 1912.

HON. EUGENE BLOCK, Chairman, Committee on Local Transportation.

Dear Sir:

The communication of H. H. Evans, dated October 15, 1912, addressed to Hon W. H. Sexton, Corporation Counsel, requesting this department for advice with reference to the extension on South Robey street from 47th to 69th street, has been assigned to me for reply.

It is stated in Mr. Evans' letter that a sufficiency of frontage consents covering this extension is now on file, and that there is now pending before the committee on Local Transportation an ordinance providing for the construction of this line by December 31, 1913, as a part of the compulsory extensions which the city may require of the Chicago City Railway Company during 1913.

Mr. Evans further states that this ordinance has not been called up for passage between the Chicago City Railway Company has not advertised "Public Notice" of intention to seek an ordinance from the City Council in compliance with our statute, and we are asked:

1. In order to make a valid grant is the Chicago City Railway Company required to make advertised "Public Notice" in accordance with our statutes?

2. If the company is not required to make such advertised "Public Notice" may the ordinance recommended July 22, 1912, now be passed and become a valid obligation and grant of rights to build under the compulsory extension provision of the ordinance of February 11, 1907?

We do not believe it is necessary that this office put itself down on record on the question of whether the Chicago City Railway Company is or is not required to give "Public Notice" in compliance with the statute. Suffice to say that the practice of passing ordinances without "publication of notice" has been followed for a number of years. In fact, so far as we have been able to learn, the passage of ordinances granting track rights to the Chicago City Railway Company by the City of Chicago has never been preceded by the publication of "Public Notice" in compliance with our present law. This practice followed by the Chicago City Railway Company during its entire history has never been questioned by the city so far as we can ascertain, and we doubt whether the company would contest the validity of the ordinances on this ground since such action would cloud and envelope in doubt some of the most important ordinances of the company.

Furthermore, it is pointed out that in the order passed by the City Council requiring the company to construct the particular extension now in question as part of the compulsory extensions for the year 1912, the company was specifically ordered "to take all steps and perform all acts necessary to construct and equip such additional extension in compliance with the ordinance of February 11, 1907, and in compliance with the statute of the State of Illinois."

The company has been notified and given reasonable opportunity to take all necessary steps in full compliance with the statute and certainly cannot set up its own default as ground for questioning the validity of the ordinance.

It is our opinion that the ordinance can be called up for passage at any time in the discretion of your Committee.

Yours respectfully,

JOHN W. BECKWITH,

MAX M. KORSHAK,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

OCTOBER 24, 1912.

HON. JOHN E. TRAEGER, City Comptroller.

Dear Sir:

In compliance with your verbal request we have examined a list of claims made by the City of Chicago against the West Chicago Park Commissioners amounting to \$155,029.78, which list of claims is hereunto attached, and we have also carefully considered the Act passed by the legislature of this state, which was approved and came into force May 25, 1909 (Hurd's Revised Statutes 1911, page 1707), and from information furnished to us by Harvey T. Weeks & Company and from a statement made by the West Chicago Park Commissioners at a meeting which we attended and where the subject matter of this opinion was under discussion, we are of the opinion that none of the City's claims come within the purview of said Act of May 25, 1909, except those covered by warrants numbered 10,829, 10,830, 23,818, 23,947, 24,004 and 24,585.

We are further of the opinion that the City's right to force payment of these claims is more or less befogged with technicalities and uncertainty.

We, therefore, unhesitatingly advise you that it is to the best interests of the City that it accept from said West Chicago Park Commissioners the proceeds of the sale of one hundred thousand dollars (\$100,000) of their four per cent. bonds in full settlement of all claims which the City has against said West Chicago Park Commissioners for improvements made on streets, avenues or alleys adjoining public parks or

pleasure grounds under the control of said commissioners which were made prior to the 25th day of May, A. D. 1909.

We herewith hand you a draft of an ordinance in accordance with this opinion.

Very truly yours,

CHAS. M. HAFT,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

OCTOBER 26, 1912.

HON. EUGENE BLOCK, Chairman, Committee on Local Transportation.

Dear Sir:

We are in receipt of your communication requesting the opinion of this department as to whether the ordinances to the various elevated railroad companies properly and legally contained a term of fifty years.

All the elevated railroad companies through their ordinances have obtained rights in the streets for fifty years and the question arises as to whether such grant is in conflict with the provisions of the "horse and dummy railroad act" of 1874. This act was amended March 7, 1899, but the provisions of both acts with regard to the duration of the term of a grant to a street railroad are identical.

I am of the opinion, however, that the limitation of twenty years contained in these acts does not apply to the elevated railroad companies. The act provides:

"That any company which has been or shall be incorporated under the general laws of this state for the purpose of constructing, maintaining or operating any horse, dummy or street railroad or tramway"

may have the right of eminent domain.

Section 3 of the act provides that:

"No such company shall have the right to locate *
* * without the consent of the corporate authorities
of such city, * * *. Such consent may be granted
for a period not longer than twenty years * * *."

It will be seen from the above that the corporations who

may not be granted rights to locate or construct railroads upon public streets are specifically those companies incorporated under the laws of this state for the purpose of maintaining or operating a horse, dummy or street railroad. The elevated railroad companies are none of them such as have been incorporated under the laws of this state for the purpose of operating any horse, dummy or any street railroad, but on the contrary have all been incorporated under the general railroad act and for the purpose of constructing and operating commercial railroads. The test under the horse and dummy act what corporations shall enjoy the rights conferred thereby and be subject to the obligations therein imposed is whether or not they were *incorporated* as street railways and not whether they were operating on streets or maintaining tracks on the same.

It is true that for many purposes an elevated or commercial railroad while it maintains and operates tracks on and along a public street is considered a street railroad, yet this cannot alter the language of the statute in question which designates the form of incorporation and not the method or place of operation as the criterion by which the corporation shall be held as coming within the purview of the act.

I am, therefore, of the opinion, so far as the terms alone of the ordinances to the elevated railroads are concerned, that the city had the power to give them rights in the streets for the corporate life of these companies. This, of course, is not to be considered as intending to convey the impression in any respect that any valid rights were actually granted to these companies by the elevated ordinances.

Yours respectfully,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

OCTOBER 30, 1912.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

By a communication dated October 22, 1912, Mr. Ricard O'S. Burke, assistant engineer of rivers and harbor, has submitted to this office for an opinion the application of Rudolph D. Huszagh and Henrietta Huszagh, owners of the premises known as 5455 Sheridan road, for a permit to fill in with sand, clay and earth that part of said premises not built on, to a point level with the top of the cement breakwater or seawall at the east end thereof; also for a permit to erect a fence on the north and south lines of said land extending over the breakwater or cement seawall to a line even with Lake Michigan.

First. As to the permit to fill in the said premises with sand, clay and earth, I can see no objection to the granting of said permit with the usual safeguarding clause inserted for reasons as follows:

The portion of the lake front where said premises are located is within the jurisdiction of the Commissioners of Lincoln Park and the said commissioners and the shore owners, from whom Mr. and Mrs. Huszagh have derived title, have obtained a decree, entered in the Circuit Court of Cook County, Illinois, on July 6, 1908, establishing and confirming the boundary line between the property owned by said shore owners and the submerged lands to be taken and improved by said Commissioners of Lincoln Park for boulevard and park purposes pursuant to and as provided in an act of the general assembly of this state approved May 14, 1903, in force July 1, 1903, amending an act approved June 15, 1895, in force July 1, 1895. Said act of May 14, 1903, provides for the establishing of such a dividing or boundary line between the lands of petitioning shore owners and the submerged lands of said Board of Park Commissioners, and further provides that:

“The owners of said shore lands shall have the right to improve, protect, sell and convey the shore lands up to the boundary line so established, free from any adverse claim in any way arising out of any question as to where

the shore line was at any time in the past or as to the title to existing accretions, if any, to said shore land."

Said decree further provides:

"That said complainants, each for himself and for his successors in title in respect to his own premises, may have the privilege of taking from the bed of Lake Michigan immediately east of said boundary line opposite his own premises, either by suction process or otherwise, a sufficient amount of sand to fill up his said premises lying west of said boundary line to the established grade required by the ordinances of the City of Chicago, or if no such grade be established, then to the level of the ordinary surface of the improved properties in the same vicinity over the entire surface of said parcels of property from said boundary line to the western limits thereof, provided, however, that all sand desired by such owners for the purpose aforesaid shall be taken and applied to such filling prior to the actual construction by said commissioners of a driveway or boulevard upon said park property opposite the premises of such owner, and it is ordered, adjudged and decreed that each of said complainants shall have the right and privilege of drawing sand from the bed of the lake opposite his own premises east of said boundary line for the purpose, and within the limitations hereinabove described."

The said premises are east of Sheridan road and a little to the south of Catalpa avenue. Said boundary line fixed by said decree is represented on a blue print accompanying said application as being about 170 feet east of the shore line of April 18, 1901, according to a survey made by Greeley-Howard Company.

Second. As to the application for a permit to erect a fence on the north and south lines of the lands of said applicants extending over the breakwater or cement seawall to a line even with Lake Michigan, I can see no objection to the granting of this permit, provided that the height of said fence and the materials to be used in construction of the same are such as to comply with the ordinances of the City of Chicago, and further provided, that the rights of the Commissioners of Lincoln Park are not prejudiced by the erection of the said fence.

I would suggest, however, that the application for the

permit be so amended as to set forth the height of said fence and the materials to be used therefor.

I return herewith:

1. Diagram showing said premises.
2. Plat showing lake front from Berwyn avenue to Bryn Mawr avenue and east from Sheridan road.
3. Copy of decree entered by Circuit Court of Cook County on July 6, 1908, establishing said boundary line.
4. Blue print copy of plat which was made part of said decree.
5. Application for permit.

Respectfully submitted,

JAMES G. SKINNER,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

OCTOBER 30, 1912.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

We have your letter of the 24th instant in the above matter with correspondence and claim thereto annexed.

Assuming the facts of this case to be as stated in the claim and accompanying letter from the ice company, we are of the opinion that the claim is a valid one and should be paid.

The facts as stated are that the ice company leased these premises from the city for one year from the 14th of November, 1911, and paid in advance one year's rent, being the sum of \$265.58. The lease contained the usual clause empowering the city to terminate the lease on a thirty days' notice.

In February, 1912, the city elected to terminate the lease and served notice to that effect on the company. After obtaining some extension the company vacated the premises on the 14th of April, 1912. That is to say, the company occupied the premises for five months out of the twelve. It now

claims a rebate of the rent for the remaining seven months, being seven-twelfths of the rent paid.

Possibly, the doubt of the council and of your committee as to whether this rent ought to be refunded may have arisen from an opinion rendered by this office in the case of the leases of sub-sidewalk space held by the Supreme Court to have been beyond the power of the city and void. The present case, however, is entirely different and we do not think that the doctrine that money paid under a mistake of law cannot be recovered has any application here.

The company figures the seven-twelfths of the rent at \$154.93. We figure it at \$154.92. The claim should be allowed for this amount.

Very respectfully yours,
 WILLIAM DILLON,
Assistant Corporation Counsel.

Approved:
 WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 1, 1912.

DR. G. B. YOUNG, Commissioner of Health.

Dear Sir:

Your communication of October 8th addressed to this department requesting a definition of the word "Harbor" as used in Sections 1130, 1132 and 1134 of the Chicago Code of 1911, has been referred to me for reply.

The harbor of Chicago is defined in Section 1097 of the Chicago Code of 1911, but said section was on October 22, 1912, amended to read as follows:

"The harbor shall consist of the Chicago River and its branches to their respective sources, the Ogden canal, all slips adjacent to and connecting with the Chicago River, the Calumet River and all slips connecting therewith, the waters of Lake Calumet, all slips and basins connecting therewith and all piers, breakwaters and permanent structures therein, the drainage canal, all piers and basins, and the waters of Lake Michigan, including all breakwaters, piers and permanent structures therein for a distance of three miles from the shore between the north and south lines of the city extended. The harbor

as herein defined shall be subject to the control of the harbor master, under the supervision and according to the directions of the Commissioner of Public Works, and the use thereof shall be governed by the ordinances of the city. The words 'vessels,' 'crafts' and 'floats' shall be deemed to include every kind of sailing, steam or other vessel lying or floating in or navigating the harbor."

Section 1, Article V, Clauses 40 and 78 of the Cities and Villages Act of April 10, 1872, in the enumerated powers of the city council, provide:

40. "To provide for the cleansing and purification of the waters, watercourses and canals and the draining or filling all ponds on private property whenever necessary to prevent or abate nuisances."

78. "To do all acts, make all regulations which may be necessary or expedient for the promotion of the health or the suppression of disease."

Section 2 of Article X, Chapter 24, Cities and Villages Act, provides:

"For the purpose of establishing or supplying water works, any city or village may go beyond its territorial limits and may take, hold and acquire property by purchase or otherwise; shall have power to take and condemn all necessary lands or property therefor, in the manner provided for the taking or injuring private property for public uses; *and the jurisdiction of the city or village to prevent or punish any pollution or injury to the stream or source of water, or to such water works, shall extend five miles beyond its corporate limits, or so far as such water works may extend.*"

Section 3 of "An Act authorizing cities, incorporated towns and villages to construct and maintain water works," approved and in force April 15, 1873, provides:

"For the purpose of erecting, constructing, locating, maintaining or supplying such water works, any such city, incorporated town or village may go beyond its territorial limits, and may take, hold and acquire property and real estate, by purchase or otherwise; and shall also have the power to take, hold and acquire and condemn any and all necessary property and real estate for the location, erection, construction and maintaining of such water works, in the manner provided for the taking and condemning of private property for public use; and may also acquire and hold real estate and other property and

rights necessary for the location, erection, construction and maintenance of such water works, by purchase or otherwise; *and the jurisdiction of such city, town or village, to prevent or punish any pollution or injury to the stream or source of water for the supply of such water works shall extend ten miles beyond its corporate limits.*"

Replying to your question as to whether the city has any jurisdiction which will enable it to enforce restrictions in regard to dumping within the five mile limit specified in Section 1130 aforesaid, I am of the opinion that the city as to all persons except the agents of the government of the United States, has the power to prevent dumping in Lake Michigan within the limit specified by said section, and that by ordinance said limit might be increased to ten miles as provided in Section 3 of the aforesaid act of April 15, 1873.

The government of the United States has power under the constitution over commerce and navigation and as an incident thereto improves and dredges out harbors and disposes of the dredgings as it sees fit. This power is delegated by Congress to the Secretary of War, and any order that he may issue with reference to the disposition of dredgings is final. The power of the general government, however, is employed in the regulation of commerce and navigation and is exclusive in reference thereto.

An opinion by the Hon. John W. Griggs, Attorney General of the United States, was furnished to the Secretary of War, December 4, 1899, dealing with the question, "Whether the authorities of the City of Chicago can legally prohibit dumping of material dredged from the harbor of Chicago under contracts with the government within the limits selected and designated by the Secretary of War in accordance with the authority conferred upon him by the laws of Congress." This opinion is found in 22 Opinions of Attorneys General, p. 646. I quote from the same as follows:

"If it be thought that in the performance of the work of improving the harbor of Chicago, any detail of the mode adopted by the Secretary of War—for instance, the place selected for deposit of dredged material—will be injurious or dangerous to the health or comfort of the people of that city, the remedy is by appeal to the good sense, discretion and fairness of the secretary, and not by

municipal interference with public work ordered by Congress, or the arrest of persons engaged in that work. And while an ordinance of the City of Chicago may, as to all persons subject to its jurisdiction, forbid the deposit of any heavy substance in the waters of Lake Michigan within eight miles of the shore in front of that city, it cannot control or limit the power of Congress over the navigable waters of the United States, nor dictate where it shall or where it shall not deposit, within such waters, material removed in the improvement of one of its harbors."

On June 23, 1910, an act entitled "An Act to prevent the dumping of refuse material in Lake Michigan at or near Chicago," passed by Congress, became a law. This act is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall not be lawful to throw, discharge, dump or deposit, or cause, suffer, or procure, to be thrown, discharged, dumped or deposited, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state into Lake Michigan, at any point opposite or in front of the County of Cook, in the State of Illinois, or the County of Lake in the State of Indiana, within eight miles from the shore of said lake, unless said material shall be placed inside of a breakwater so arranged as not to permit the escape of such refuse material into the body of the lake and cause contamination thereof; and no officer of the government shall dump or cause or authorize to be dumped any material contrary to the provisions of this act: Provided, however, that the provisions of this act shall not apply to work in connection with the construction, repair and protection of breakwaters and other structures built in aid of navigation, or for the purpose of obtaining water supply. Any person violating any provision of this act shall be guilty of misdemeanor, and on conviction thereof shall be fined for each offense not exceeding one thousand dollars."

The subject-matter of Sections 1130, 1132 and 1134 of the Chicago Code embraces sanitary and health regulations of the city. Laws for the regulation of health fall within the scope of police power and this is a power reserved to the states. A state has all power necessary for the protection of the property, health and comfort of the public and it may dele-

gate this power to local municipalities in such measure as may be deemed desirable for the best interests of the public.

While the states have delegated to Congress the power to regulate commerce and navigation, they have not surrendered their police powers to the general government. The existence of the power in Congress to control a harbor and the towing in and out of vessels engaged in commerce does not of itself prevent local legislation for the security of the property, health, comfort and convenience of the people. (*Harmon v. City of Chicago*, 110 Ill. 400, 408 and 411.)

In *Barbier v. Connolly*, 113 U. S. 27, 30, the Supreme Court of the United States in construing the 14th amendment to the Constitution, with reference to its application to an ordinance of the City of San Francisco regulating public laundries, said:

“But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people.”

In *Keller v. United States*, 213 U. S., p. 144, the court says:

“‘In the American constitutional system,’ says Mr. Cooley, ‘the power to establish the ordinary regulations of police has been left with the individual states, and cannot be assumed by the national government.’ Cooley, Const. Lim., 574. While it is confessedly difficult to mark the precise boundaries of that power, or to indicate, by any general rule, the exact limitations which the states must observe, in its exercise, the existence of such a power in the states has been uniformly recognized in this court. (Citing authorities.) It is embraced in what Mr. Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 1, calls that ‘immense mass of legislation,’ which can be most advantageously exercised by the states, and over which the national authorities cannot assume supervision or control.”

And on page 146 the court further says:

“While it may be a police power in the sense that all provisions for the health, comfort and security of the citizens are police regulations, and an exercise of the

police power, it has been said more than once in this court that, where such powers are so exercised as to come within the domain of federal authority, as defined by the Constitution, the latter must prevail."

Again, in *Gulf, Colorado & Santa Fe Railroad Company v. Hefley*, 158 U. S., p. 98, the court at page 104 comments upon *Morgan v. Louisiana*, 118 U. S. 455, to the effect that, that case upheld certain quarantine laws of the State of Louisiana although, to a certain extent, these laws affected commerce with foreign nations, and further proceeded to quote from the opinion in the Morgan case as follows:

" 'It may be conceded that whenever Congress shall undertake to provide for the commercial cities of the United States a general system of quarantine, or shall confide the execution of the details of such a system to a national board of health, or to local boards, as may be found expedient, all state laws on the subject will be abrogated, at least so far as the two are inconsistent. But until this is done, the laws of the state on the subject are valid.' "

It is to be observed, that the said act of June 23, 1910, is not in regulation of commerce or navigation, but is strictly and purely a law for sanitary regulation, the subject-matter of which comes within the reserved powers of the states and does not fall within the domain of the federal authority as defined by the Constitution. Neither does this act "provide for the commercial cities of the United States a general system of quarantine," but it is on the other hand restricted to the prevention of contamination of the waters of Lake Michigan in front of Cook County, Illinois, and Lake County, Indiana.

I am therefore of the opinion that the city council, under the powers delegated by the state legislature, as above set forth has ample authority for making all the necessary restrictions referred to in your letter, and that the government of the United States has no right or authority to interfere with such restrictions or regulations, except as heretofore set forth, at least until Congress shall undertake to provide for

the commercial cities of the United States a general system of quarantine regulation.

Respectfully submitted,
JAMES G. SKINNER,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 1, 1912.

HON. JOHN E. TRAEGER, City Comptroller, Chicago.

Dear Sir:

We have had under consideration for several days the question of the return of money belonging to the Village of Morgan Park authorities.

Under the injunctive order of Judge Walker, which is now unassailable and must be followed out, the city is restrained from retaining any moneys received either from the village authorities or from the County Treasurer or County Collector, and is required to pay back all such moneys.

The status is such that even though we may have a valid claim against the Village of Morgan Park for money expended, nevertheless if we cannot come to an understanding with them, we are bound to return their money in full and recover through other means any money lawfully due us from the village.

We, therefore, recommend that so far as the moneys are in separate funds in your office and accessible as such, the same be returned at once upon the demand of the proper village authorities; thus there is no purpose in retaining in the hands of the City Treasurer any money collected on special assessments either directly or through the County Treasurer. The same is true of the payments from the County Treasurer which you have been holding subject to the order of the court.

With regard to the balance now in the possession of the City Treasurer, we understand that there are only remnants of the funds received from the village treasurer, such moneys

having been mingled with the city's corporate fund and paid out from time to time.

In order to arrive at an adjustment as to these moneys, we suggest that you prepare a sort of statement of account, which we will submit to the village attorney, with a view to ascertaining whether we can reach a settlement without court proceedings. Such statement shall be as complete as possible, including all expenses or outlays which you consider properly chargeable against the village. The funds that are intact, however, and which we recommend that you pay back at once, are not affected, and therefore payment on them need not be delayed.

There is a claim made in one of the letters for license fees for licenses issued to residents of Morgan Park during the period of the supposed consolidation of the two municipalities. We do not regard this claim as well founded. The city was exercising governmental control, and, having established a *de facto* government in the territory, was entitled to these license fees. In any event, if they were improperly collected, the village would not be entitled to the proceeds, but the parties paying would be the rightful claimants. We mention this fact because it might be brought up when these matters are taken up for adjustment.

We suggest that you communicate with the village treasurer as soon as possible in order that he may understand that we are following out the decree of the court with all due promptness.

Yours respectfully,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 2, 1912.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

Replying to a letter of Mr. Frank W. Solon, Superintendent of Streets, dated October 17, 1912, and asking for

advice of this department as to the city's rights in the matter of removing sheds, bathhouses, lockers, etc., from the Wilson-Clarendon Beach, I beg to reply as follows:

An examination of the recorded plats in the recorder's office of Cook County shows that Wilson avenue east of Clarendon avenue to the foot of the street at Lake Michigan, is 80 feet wide and that the south line of Wilson avenue east of Clarendon avenue is 10.5 feet south of the south line extended of said Wilson avenue west of Clarendon avenue. The blue print submitted with Mr. Solon's letter shows that the structure at the water's edge extends north of the south line of Wilson avenue 9.8 feet. This structure which is indicated on said blue print as a recreation pier extends west 303 feet and at that point, as appears from said blue print, encroaches upon the street 11.2 feet north of the south line of the street.

The bathing beach in question has heretofore been operated by Emelie Cleys. On July 13, 1909, an injunction suit, General No. 291,945, was filed in the Circuit Court of Cook County by said *Emelie Cleys et al. v. City of Chicago et al.* The prayer contained in said suit asked for a temporary restraining order enjoining the City of Chicago, its officers, agents, police, attorneys and its Mayor, to refrain from enforcing the ordinance of May 24, 1909, or any of its terms and provisions against the complainants, the Wilson Avenue Bathing Beach Company and the said Emelie Cleys, or either of them, and from instituting any suits against them or either of them or their attorneys or agents, until further order of the court, or from in any manner closing, attempting to close, molesting or interfering with the premises and business of the complainants, and that upon the final hearing the temporary injunction may be made permanent, and the ordinance of May 24, 1909, be adjudged invalid.

Said ordinance of May 24, 1909, required the written consent for the location of a bathing beach of a majority of the *bona fide* owners living within 1,000 feet from the nearest point of such bathing beach.

On the same day that this suit was filed, an order was entered by Judge Charles M. Walker, enjoining the defendants, as prayed in the bill, until further order of court.

On September 3, 1912, on petition filed by the City of Chicago and its Mayor, an order was entered by Judge Baldwin whereby

“it is ordered, adjudged and decreed that the order entered on July 13, 1909, enjoining the defendants as prayed in bill herein filed, be and the same is hereby vacated and dissolved, except in so far as it enjoins the City of Chicago, its officers, agents, police and attorneys, and Mayor of said City of Chicago, from in any manner enforcing the ordinance of May 24, 1909, set forth in the bill herein, or any of its terms and provisions against the Wilson Avenue Bathing Beach Company and Emelie Cleys, the complainants herein, until further order of this court.”

It would therefore appear that the aforesaid injunction can have nothing whatever to do with the removal of the aforesaid structure or structures as obstructions from Wilson avenue.

The Cities and Villages Act of April 10, 1872, Item Ten, Par. 63, Art. 5, Starr and Curtis, p. 694, enumerating the powers of the city council, is as follows:

“To prevent and remove encroachments or obstructions upon the same.”

The word “same” refers back to item seven and includes streets, alleys, avenues, sidewalks, wharves, parks and public grounds.

In pursuance of the above grant of power by the legislature of the state, the city council has enacted two ordinance sections, contained in the Chicago Code of 1911, as follows:

“2074. POWER TO REMOVE OBSTRUCTIONS.) The Commissioner of Public Works may direct the removal of any article or thing whatsoever which may encumber or obstruct any street, avenue or alley in the city.”

“2434. OBSTRUCTIONS—REMOVAL.) The Commissioner of Public Works is hereby authorized to order any article or thing whatsoever which may incumber or obstruct any street, alley, public landing, wharf or pier within said city to be removed; if such article or thing shall not be removed within six hours after notice to the owner or person in charge thereof to remove the same, or if the owner cannot be readily found for the purpose of such notice, he shall cause the same to be removed to

some suitable place, to be designated by the said commissioner. The owner of any article so removed shall be subject to a penalty of not more than ten dollars, in addition to the costs of such removal."

The word "article" in the two foregoing sections, without doubt, refers to personal property or things personal. As to the use and meaning of the word "thing," Blackstone in defining property rights divides and classifies these rights into the rights in *things personal* and the rights in *things real*.

I am of the opinion that a close examination of the two sections above quoted will disclose that the word "thing" is used therein as applying to *things personal* and not to *things real*, and I, therefore, conclude that if the structure or structures referred to are of a temporary character, being in the nature of tenant's fixtures and in contemplation of law, personal property, the same may be removed under the authority of the foregoing sections, but if they are of a permanent character and constitute a part of the realty, they are not subject to removal under said sections, and I have not been able to find any other sections in the Code which would authorize their removal as real property.

I have gone back to the Revised Municipal Code of Chicago of 1905, and made a thorough search in the same for appropriate sections or provisions covering the removal of buildings or structures which constitute a part of the realty and I have been unable to find any such provisions.

I have also made an examination of the Revised Code of Chicago of 1897 and in Ch. 61 on Streets in the Miscellaneous provisions I find three sections which properly apply to the subject-matter, if the same is realty. These sections are as follows:

"1882. ERECTION OF BUILDING IN STREET.) No person shall erect or place any building, in whole or in part upon any street, alley, sidewalk or other public ground within this city, under a penalty of not more than fifty dollars."

"1883. STREETS HEREAFTER TO BE OPENED—OBSTRUCTIONS). The owner of any building, fence, porch, steps, gallery or other obstruction, now standing or which may hereafter be erected or placed upon any street, alley or sidewalk, or public ground within this city, or

which may be left standing upon any new street that has been or may hereafter be opened, shall remove the same within such reasonable time, not exceeding thirty nor less than three days, as he shall be required so to do by a notice signed by the commissioner of public works, under a penalty of not less than twenty-five dollars nor more than one hundred dollars, and a further penalty of ten dollars for every day the same shall so remain.”

“1884. REFUSAL TO REMOVE—NUISANCE.) Whenever the owner of any building, fence or other obstruction upon any street, alley, sidewalk or public ground in this city shall refuse or neglect to remove the same, after notice as prescribed in the preceding section, or if the owner cannot be readily found for the purpose of such notice, the same shall be deemed a nuisance, and it shall be lawful for the commissioner of public works and is hereby made his duty to cause the same to be removed or taken down, in his discretion, and the expense thereof shall be recoverable of the owner in action of assumpsit, and every person who shall oppose or resist the execution of the orders of said commissioner in the premises shall be subject to a penalty of not more than one hundred dollars.”

Why the three foregoing sections were omitted from the revisions of the Code as made in 1905 and 1911, I am unable to explain, unless those who had charge of such revisions were of the opinion that Section 1862 of the Revised Municipal Code of 1905 and said Section 2074 of the Chicago Code of 1911, which are exactly alike, were broad enough in terms to authorize the removal of buildings and structures of a permanent character.

I am, however, of the opinion that this short section is not sufficient and that notice to the owner or person in possession, to remove, with reasonable time thereafter given for removal, should be included in a properly drawn section, and further that some penalty or forfeiture should be attached for non-compliance with the city's demand for removal.

I am further of the opinion that either the omitted sections above quoted or a proper revision of the same should be enacted by the city council and made a part of the city's present Code in order to confer upon the Commissioner of Public Works the proper authority for the removal of buildings and other structures which are a part of the realty. An

ordinance applied only to an individual case or to special facts and circumstances would not be legal. It should be general in its terms, applying to all cases alike.

The law as laid down in the case of *Hibbard and Company v. City of Chicago*, 173 Ill. 91, without doubt, applies to the foregoing state of facts. The court says at p. 96:

“A permanent encroachment upon a public street for a private use is a purpresture, and is, in law, a nuisance. Wood on Nuisances, Secs. 260, 262 and 251; *Driggs v. Phillips*, 103 N. Y. 77; *Attorney General v. Heishon*, 18 N. J. Eq. 410; *Smith v. State*, 23 N. J. L. 712; *State v. Woodward*, 24 Vt. 92; *State v. Atkinson*, 24 Vt. 681; *Chamberlain v. Enfield*, 23 N. H. 356; *Commonwealth v. King*, 13 Metc. 115.”

And at page 98:

“But when the city demands the removal of such a structure, it, if permitted to remain thereafter, becomes a nuisance. (Citing authorities.) * * * A municipal corporation cannot confer power upon one person, to do an act which is prohibited, to another having an equal right to do the same act, and ordinances cannot favor or discriminate against any person or class of persons, but *must be uniform and of general operation within the corporate limits.*”

And again, at page 99:

“The right of the public to the exclusive use of the streets for public purposes is inconsistent with the right of a private citizen to encroach thereon by the erection of a permanent structure.”

Summarizing the foregoing, it is my opinion that if the structure or structures referred to are temporary in character, as tenant's fixtures, being merely personal property, then the Commissioner of Public Works has the right and authority to proceed under the sections of the present Code heretofore quoted, but if they are of a permanent character and constitute a part of the realty then new legislation by the city council will be necessary before they can be removed.

I return herewith blue print showing the location of the structures referred to.

Respectfully submitted,
JAMES G. SKINNER,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 7, 1912.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

I have investigated the matter of the petition of Arthur Pyne for refund of money paid for plumber's license in 1894 and subsequent years, Committee on Finance No. 1830.

Mr. Pyne claims to have paid the City of Chicago the aggregate amount of \$135.00 for master plumber's license for the years 1894, 1895, 1896, 1897 and 1898, and that because the ordinance under which said license fee was collected was afterwards declared void by the Supreme Court, that said money should be refunded.

The ordinance under which this license was collected was declared void by the Supreme Court in *Wilke v. City of Chicago*, 188 Ill. 447. It provided for a license and fixed a penalty for every violation of the ordinance.

The statement of Mr. Pyne does not claim that the payments were made under any duress.

A line of decisions in this state deny the right to recover money paid to the state or a municipality even where the statute or ordinance imposing the license is declared unconstitutional. A typical case is *Yates v. Royal Insurance Company*, 200 Ill. 202, at page 206 the court says:

"Judge Dillon, in his work on Municipal Corporations (3d Ed., Sec. 944), in discussing this question states the law to be: 'Money voluntarily paid to a corporation under a claim of right, without fraud or imposition, for an illegal tax, license or fine, cannot, there being no coercion, no ignorance or mistake of facts, but only ignorance or mistake of the law, be recovered back from the corporation, either at law or in equity, even

though such tax, license, fee or fine could not have been legally demanded and enforced.' And in Section 946: 'Where there is no mistake or fraud, a voluntary payment cannot be recovered on the mere ground that one party was under no legal obligation to pay and the other had no right to receive. Where the party would recover back taxes which he is under no legal obligation to pay, the payment must be compulsory.' "

In *Elston v. City of Chicago*, *supra*, we said (p. 518): "No case can be found where money has been voluntarily paid with a full knowledge of the facts and circumstances under which it was demanded, which holds that it can be recovered back, upon the ground that the payment was made under a misapprehension of the legal rights and obligations of the party paying."

The fact that the ordinance provided a penalty for non-compliance does not create such duress as to make the payment a payment under duress within the meaning of the law.

In the case of *Elston v. City of Chicago*, 40 Ill. 514, the court said:

"It is invariably held that a payment is not to be regarded as compulsory unless made to relieve the person or property from an actual and existing duress imposed upon him by the one to whom the money is paid."

I further call your attention to the fact that more than ten years have elapsed from the time this supposed claim accrued to the time of its presentation. Claims of this nature are legally barred after five years. The explanation by the claimant does not operate to remove the bar of the statute of limitations.

For these reasons I am of the opinion that the petition of Arthur Pyne presents no legal liability against the City of Chicago.

Very respectfully,

GEO. L. REKER,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

NOVEMBER 9, 1912.

TO THE BOARD OF TRUSTEES OF THE FIREMEN'S PENSION FUND,
Chicago.

Gentlemen:

We have before us the records, correspondence and statements of witnesses in the matter of the application of Henry W. Moennich for a pension, which your honorable board has submitted to this department for consideration and counsel.

It appears that on January 2, 1910, the applicant, who was then a member of the fire department of the City of Chicago, in the course of his duties attended a fire at what was then known as No. 360 Wabash avenue in the City of Chicago. Mr. Moennich claims that he worked in the basement of that building during the fire in water which reached up to his chest, that although after that fire he continued in active service of the fire department until January 11, 1910, on the morning of the last mentioned date, he was compelled to go home on account of illness, which he claims resulted from the fire of January 2d. The applicant immediately consulted one Dr. Slater, who treated him from that time continuously for six or seven months thereafter. Dr. Slater found that his patient was suffering from acute rheumatism, which later caused pericarditis—inflammation of the lining of the heart; that the condition of the applicant's heart was such as to cause an unequal pressure in that organ under the ordinary strain of work and that this condition in the applicant is permanent.

Dr. Slater believes that from the history of the case, as related by Mr. Moennich, his work at the fire of January 2, 1910, was the cause of the applicant's condition.

Dr. Stephen W. Cox, a reputable physician of Chicago, and examiner for the Pension Board of the United States government, confirmed the opinion of Dr. Slater in all respects.

Dr. Chas. C. Clark, of Chicago, certified that the condition of Henry W. Moennich is such at the present time that he is unfit to perform the duties of a fireman.

The records show that on June 2, 1910, charges were filed against Henry W. Moennich with the Civil Service Commis-

sion of the City of Chicago by Fire Marshal James Horan in which the applicant was charged with "neglect of duty and disobedience of orders in failing to report at company quarters while on sick leave after being ordered to do so by the Fire Marshal. He was ordered to report his condition of health at company quarters twice each week. Since May 21, 1910, he has failed to do so." These charges were withdrawn on August 12, 1910..

On July 29, 1910, new charges were filed against the applicant before the Civil Service Commission in words as follows: "Incapacity in the service in that the said Henry W. Moennich for the six months last past has been and now is physically unfit to perform the duties of a fireman." On August 12, 1910, the trial board found from the evidence that the foregoing charges were true, and the applicant was thereupon separated from the fire department.

It appears, however, that on June 6, 1910, prior to the date of the filing of the second charges against Mr. Moennich, he had applied for a pension and, upon this record, on March 16, 1911, this department rendered an opinion holding in effect that the finding of the Civil Service Commission was not binding upon the Board of Trustees of the Firemen's Pension Fund, and that the application of Henry W. Moennich for a pension should be considered as of the date of June 6, 1910, and that if upon investigation by the board it should be determined that Moennich, by reason of his service in the department, was physically disabled so as to render necessary his retirement from service in the department, a pension should be allowed Moennich.

The Board of Trustees thereupon appointed a board of physicians, consisting of Dr. W. A. Evans, then city physician, Dr. G. F. Thompson and Dr. John F. Golden, who reported to the Board of Trustees as follows: "They are unable to find any valvular disease of the heart; they find no disease of his kidneys. He has a sub-acute rheumatism which, he informs us, began on January 28, 1911. We can find no evidence of disability resulting from anything occurring in his service as fireman for the City of Chicago."

Pursuant to the report of this board of physicians, the

Board of Trustees of the Firemen's Pension Fund denied the application of Henry W. Moennich for a pension. The new Board of Trustees is now called upon to reconsider the application of June 6, 1910, and to reverse the ruling of the former board.

Section 7 of the Firemen's Pension Act provides as follows:

"If any member of the fire department of any such city, village or incorporated town shall, while in the performance of his duty, become and be found, upon examination by a medical officer ordered by said board of trustees, to be physically or mentally permanently disabled, by reason of service in such fire department, so as to render necessary his retirement from service in said fire department, said board of trustees shall retire such disabled member from service in such fire department: Provided, no such retirement on account of disability shall occur unless said member has contracted said disability while in the service of such fire department. Upon such retirement the said board of trustees shall order the payment to such disabled member of such fire department, monthly, from such pension fund, a sum equal to one-half the monthly compensation allowed to such member as a salary at the date of his retirement."

It will be seen from the foregoing section that to entitle a member of the department to be retired on a pension two conditions must exist.

1st: The person must be physically or mentally permanently disabled.

2d: Such disability must have arisen by reason of service in the fire department.

The medical officers appointed by a former board of trustees to examine into the case of Henry W. Moennich did not find that the applicant was permanently disabled and further found that there was no evidence tending to indicate that whatever disability the applicant was then under resulted from anything occurring in his service as fireman for the City of Chicago.

In *Karb et al. v. The State ex rel.*, 54 Ohio State Rep. 383, the Supreme Court of the State of Ohio construed a similar act, and on page 391 said:

"To entitle a person to a pension under this statute,

it must appear that he is a member of the fire department, that he has a partial permanent disability, that such disability was caused in, or induced by, the actual performance of the duties of his position as such member, or that the disability occurred before the expiration of ten years' service in the fire department. * * *

Upon being ordered to do so by the board of trustees it becomes the duty of a medical officer to examine the applicant and determine whether he is disabled and whether such disability is partial or total, and whether of a permanent or temporary nature, *and his determination in good faith is final*, as there is no provision for review or re-examination."

It is contended by the applicant that the finding of the board of examiners appointed by the Trustees of the Pension Board is inconsistent with that of the Civil Service Commission, which found it necessary to discharge him from the service on account of his physical disability.

The answer to that is, that the findings were not inconsistent inasmuch as the Civil Service Commission made no attempt to determine the cause of Mr. Moennich's disability. As was stated, in the Karb case, just quoted, on page 396:

"Suppose the partial permanent disability was caused by a railroad wreck on an excursion while the fireman was enjoying a vacation off duty, or while taking a pleasure ride with his own team, it would not be contended that such injury would entitle him to a pension."

Nor is the fact that the board of examiners were in error in their findings sufficient to warrant the present board in overruling the decision of the former board.

In *People ex rel. Shea v. Bryant*, 28 N. Y. App. Div. 480, the court on page 483 says:

"Nor can I acquiesce in the view which was evidently entertained by counsel who prepared the papers upon which the relator's application was based, to the effect that a fireman who has been retired by the commissioner, after a determination by the statutory board that he is permanently disabled to perform duty becomes entitled to reinstatement by reason of a subsequent recovery, which shows that the conclusion of the board was in fact erroneous. *The determination of the statutory board as to the existence of permanent disability,*

once fairly made, cannot be questioned simply on the ground that the recovery of the retired fireman has disproved its correctness. To allow this to be done would introduce insufferable confusion and complication into the practical administration of affairs of the fire department."

Section 3 of the Firemen's Pension Act provides in part as follows:

"The said board shall make all needful rules and regulations for its government in the discharge of its duties and shall hear and decide all applications for relief or pensions under this act, and its decisions on such applications shall be final, conclusive and not subject to review or revision, except by the board."

Construing similar language used in the Police Pension Act, the Supreme Court of this state in *Eddy v. People*, 218 Ill. 611, at page 616 said:

"We think it clear from a consideration of the sections of the statute that the board of trustees created by said act, in passing upon the right of the relator to participate in said fund as pensioner, exercised quasi judicial powers, and that their finding, when made, was binding upon all the world and upon the board of trustees, unless the action of the board was subsequently set aside by said board of trustees, and that said board of trustees had no power to review the action of the board which allowed said pension upon the question of the right of the relator to a pension, *except upon the ground that the board which allowed the pension was without authority to act, or the relator was guilty of fraud in procuring the pension to be allowed.*"

While the facts in the Eddy case, *supra*, indicate that the relator was *granted* a pension by a former board and that a subsequent board reversed the finding of the former board and struck the name of the relator from the pension rolls, the principle of law involved in that case is exactly the same as that in the case before your board.

There can be no question that the board of trustees which passed upon the application of Henry W. Moennich in 1911 had the power to make the finding it did. Hence the only question to be determined by your board is whether the facts presented to you indicate that the former board of trustees

was imposed upon by the board of examining physicians, or whether the finding of that board of physicians was made in good faith.

If you find from the evidence presented that a fraud has been practiced upon the former board, it is your duty to reverse this ruling and grant the applicant his pension, but if you find that the board of examining physicians rendered their honest opinion in the applicant's case, your board has no power under the law to overrule the finding of the former board.

Respectfully submitted,
JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 13, 1912.

HON. FRANCIS D. CONNERY, City Clerk.

Dear Sir:

September 18, 1912, we answered your communication of earlier date advising you as to your duty after receiving tally sheets from each precinct, as provided by Sections 15 and 18 of Chapter 46 of the Revised Statutes of Illinois (Hurd's, 1911), pp. 1037 and 1038.

We told you that it was your duty to hold the tally sheets in your office under lock and key, as provided by the statutes, for the reason that no provision seems to have been made by statute for the disposition of the tally sheets.

Today the Board of Election Commissioners requested you to have before it at its meeting tonight the tally sheets received by you in three certain precincts of the city delivered to you by the election officers of said precincts after the election of November 5, 1912. I advised your Mr. Edward J. Padden that in my opinion it was your duty to allow the Board of Election Commissioners to scrutinize these tally sheets but that you should not surrender nor deliver them out of your possession to any one. You, however, called my attention to the fact that the statute provides that the Board

of Election Commissioners and City Clerk, to whom the poll books, statements and tallies are directed by the election act to be delivered shall safely keep them "under lock and key until ordered to be surrendered as hereinafter provided." The act then provides in Section 1 of Article V of Chapter 46 that the Board of Election Commissioners shall open all returns left respectively with the Election Commissioners, the County Clerk and City Comptroller. But nowhere can we find that the act provides for any disposition to be made of the tally sheets which have been received by the city clerk.

If, however, this act should be so strictly construed as to mean that when once put under lock and key by the city clerk they shall never be taken from such custody, then the purpose of filing the same with the City Clerk would be without any force or effect whatsoever. It seems to me that as long as the City Clerk retains possession of the tally sheets, the same may be scrutinized by the Board of Election Commissioners for the purpose of checking the tally sheets filed with the other officers of the city. I can see no possible harm in so doing provided they do not leave the possession of the City Clerk; and when the purpose for which they are examined has been fulfilled they are promptly placed back into the files of the City Clerk. I am convinced that this is in complete harmony with the purposes of the election act and that any other interpretation would make the provision of the act meaningless.

Yours very truly,

WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 13, 1912.

HON. THEO. K. LONG, Chairman, Lake Shore Reclamation
Commission, Chicago.

Dear Sir:

Replying to your letter of November 7, 1912, addressed to Hon. William H. Sexton, Corporation Counsel, and suggesting that steps be taken to file suits for the reclamation of the shores of Lake Calumet and the Calumet River, I beg to state as follows:

1st: The Calumet River and Lake Calumet have been created a harbor district, known as Harbor District No. 4, by ordinance passed by the city council November 20, 1911, under authority of the Harbor Act of June 10, 1911.

On October 22, 1912, the city council of Chicago passed an amendment to Section 1097 of the Chicago Code of 1911, including within the definition of the harbor of Chicago and its harbor area, the waters of Lake Calumet, all slips and basins connecting therewith. and all piers, breakwaters and permanent structures therein. The Calumet River and all slips connecting therewith have heretofore constituted part of the harbor under the provisions of said Section 1097.

2d: The City of Chicago has caused a survey of the shores of Lake Calumet to be made, which was completed November 29, 1910. This survey was confined to the location of a shore line and a meander line. No specific tracts were located, nor were any areas computed, the title to which is claimed to be in the State of Illinois, and many of the facts necessary to the location of former submerged tracts, which have been illegally reclaimed and are now in the possession of shore owners, are not in the possession of this department. It is therefore apparent that much investigation and considerable surveying would have to be done before the proper data, upon which to base suits for the recovery of these disputed lands, could be obtained.

3d: On September 30, 1912, the city council of Chicago passed a resolution instructing its Committee on Judiciary, State Legislation, Elections and Rules to act in conjunction with the Corporation Counsel and to proceed at once with the drafting of necessary bills to cure defects in the Harbor Act of June 10, 1911, and to procure additional harbor legislation. The drafting of such bills has been assigned to the writer, and as a part of the additional legislation to be procured, I have been instructed to include appropriate provisions which would be applicable to the Calumet River and Lake Calumet for the settlement of all questions of riparian rights and the adjustment of title to "made lands" and the location of boundary lines between the shore owners and the State of Illinois, or the City of Chicago as its corporate municipal representa-

tive. It is the intention to have the aforesaid bills introduced in the State Legislature in January, 1913, immediately after it convenes and organizes.

As is well known, there is an insistent demand for harbor development in Lake Calumet, it being claimed that this is the logical site for the great industrial harbor of Chicago. If the aforesaid harbor legislation can be procured, it is my belief that it will provide a more immediate and definite settlement of the "made land" questions involved than the bringing of information suits on the relation of the Attorney General and the State's Attorney, for the reason that litigation of this character is apt to be long drawn out and subject to delays, and if in the end successful the title would be decreed to be in the State of Illinois and legislation by the State Legislature would still be necessary before any portion of these "made lands" could be devoted to harbor purposes.

For the reasons above set forth, I am therefore of the opinion that efforts for the solution of the questions involved should be concentrated along the lines of procuring the legislation, above referred to, and that the bringing of suits in behalf of the people by the Attorney General and the State's Attorney should be postponed at least until the outcome of such efforts is known.

Respectfully yours,
JAMES G. SKINNER,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 14, 1912.

BOARD OF INSPECTORS OF THE HOUSE OF CORRECTION OF THE
CITY OF CHICAGO.

Gentlemen:

The superintendent of the House of Correction has requested the opinion of this department as to whether or not your board is legally entitled to a lump sum of money with which to pay the salaries of employees of the House of Correction.

The House of Correction is governed and the duties of the directors thereof imposed by "An Act to establish houses of correction, and authorize the confinement of convicted persons therein." (Approved April 25, 1871. In force July 1, 1871, Hurd's Revised Statutes 1911, Ch. 67, page 1276.)

Section 3 provides in part that:

"No appropriation of money shall be made by the said board of inspectors for any purpose other than the ordinary and necessary expenses and repairs of said institution, except with the sanction of the legislative authority of said city."

Section 5 provides as follows:

"BOOKS—QUARTERLY STATEMENT—ACCOUNTS.) §5. The books of said house of correction shall be so kept as to clearly exhibit the state of the prisoners, the number received and discharged, the number employed as servants or in cultivating or improving the premises, the number employed in each branch of industry carried on, and the receipts from, and expenditures for, and on account of, each department of business, or for improvement of the premises. A quarterly statement shall be made out, which shall specify minutely, all receipts and expenditures, from whom received and to whom paid, and for what purpose; proper vouchers for each, to be audited and certified by the inspectors, and submitted to the comptroller of said city, and by him, to the legislative authority thereof, for examination and approval. The accounts of said house of correction shall be annually closed and balanced on the first day of January of each year, and a full report of the operations of the preceding year shall be made out and submitted to the legislative authority of said city, and to the governor of the state, to be by him transmitted to the General Assembly."

Section 6 provides in part as follows:

"FURTHER REPORTS—REMOVAL OF OFFICERS, ETC.) §6. The legislative authority of said city may require such further reports and exhibits of the condition and management of such institution as to them shall seem necessary and proper, and may, with the approval of the mayor, remove any inspector, of said institution.
* * *"

Section 13 provides as follows:

"EXPENSES.) §13. The expenses of maintaining any such house of correction over and above all receipts

for the labor of persons confined therein, and such sums of money as may be received from time to time by virtue of an agreement with a county, as in this act contemplated, shall be audited and paid from time to time by the legislative authority of such city, and shall be raised, levied and collected as the ordinary expenses of the said city."

From a consideration of the above paragraph, it would seem that under the authority granted in Section 3, the ordinary and necessary expenses and repairs of the institution may be appropriated for by the board of inspectors, and by Section 13 the source from which such expenditures can be made are the receipts for the labor of persons and such sums as be received under an agreement with the county. As a matter of fact, these sources of revenue are insufficient to pay the ordinary and necessary expenses of the maintenance of the House of Correction and recourse is annually had to the City Council for an appropriation to make up the deficit. This amount of money over and above the receipts of the institution must be raised, levied and collected as are the ordinary expenses of the city, and in the method of appropriating for such expenses and levying taxes therefor it is plain that the statute contemplates the same method should be followed as in ordinary city expenditures.

Section 122 of Ch. 120, Hurd's Revised Statutes of 1911, page 1928, provides as follows:

"(CERTIFICATE OF RATES.) §122. The proper authorities of towns, townships, districts and incorporated cities, towns and villages, collecting taxes under the provisions of this act, shall annually, on or before the second Tuesday in August, certify to the county clerk the several amounts which they severally require to be raised by taxation, anything in their respective charters, or in acts heretofore passed by the General Assembly of this state, to the contrary notwithstanding."

Section 2, page 272, Art. 7, Ch. 24, Hurd's Revised Statutes 1911, provides in part that:

"(ANNUAL APPROPRIATION ORDINANCE.) §2. The city council of cities * * * shall, within the first quarter of each fiscal year, pass an ordinance, to be termed the annual appropriation bill, in which such corporate authorities may appropriate such sum or sums of money

as may be deemed necessary to defray all necessary expenses and liabilities of such corporation; and in such ordinance shall specify the objects and purposes for which such appropriations are made, and the amount appropriated for each object or purpose. * * *

Section 1 of Art. 8, Ch. 24, Hurd's Revised Statutes 1911, page 276, provides in part:

"The city council in cities * * * may levy and collect taxes for corporate purposes in the manner following:

The city council * * * shall, annually, on or about the third (3d) Tuesday in September in each year, ascertain the total amount of appropriations for all corporate purposes legally made and to be collected from the tax levy of that fiscal year; and by an ordinance specifying in detail the purposes for which such appropriations are made and the sum or amount appropriated for each purpose respectively, levy the amount so ascertained upon all the property subject to taxation within the city or village as the same is assessed and equalized for state and county purposes for the current year. * * *

It will be seen from the above two provisions last quoted that the statute contemplates a specification of the objects and purposes for which an appropriation is made, not only in the annual appropriation ordinance itself, but likewise that in the tax levy ordinance to raise funds for municipal maintenance, other than those received from miscellaneous sources, a detailed statement of the purposes of such appropriations is necessary. This has been the practice followed by the city council for many years and any serious departure therefrom, such as would be entailed by appropriating a lump sum of money for the use of the House of Correction, would in my opinion not only violate this custom but be directly contrary to the statutory provisions in that behalf.

In *C. I. & W. Ry. Co. v. The People*, 207 Ill. 566, 574, it is said:

"* * * Neither of the three distinct purposes for which the levy of the gross sum of \$175.00 was to be made, except 'miscellaneous,' is mentioned in the appropriation ordinance. None of the items of the levy ordinance agree with the appropriation ordinance. The board of trustees did not 'ascertain the amount of appropriations heretofore legally made and levy same,' as required

by Section 111, Chapter 24, Revised Statutes of Illinois; and did not 'specify in detail the purposes for which appropriations were made, and the sum or amount appropriated for each purpose respectively.' We have held that the statute requires that a city ordinance for the levy of municipal taxes shall specify in detail the purposes for which the appropriations are made and the amount appropriated for each purpose. (*People ex rel. v. Peoria, Decatur and Evansville Railroad Co.*, 116 Ill. 410.)"

Also in *The People ex rel. v. C., I. & W. Ry. Co.*, 224 Ill., page 523, it is said:

"* * * Section 121 of Chapter 120 (Hurd's Stat. 1905, p. 1662), after providing that the county boards of the respective counties shall annually, at the September session, determine that amount of all taxes to be raised for county purposes, requires, that 'when for several purposes, the amount for each purpose shall be stated separately.' The third item as specified by the board of supervisors does not comply with that requirement. It has embraced in it several different purposes but the amount to be levied for each is not named or specified. We have recently held in several cases that a tax levied under the foregoing section is illegal and void in the absence of a compliance with the provision that 'when for several purposes, the amount for each purpose shall be stated separately.' *Chicago, Burlington and Quincy Railroad Co. v. People*, 213 Ill. 458; *Cincinnati, Indianapolis and Western Railway Co. v. People*, *id.* 197; *Chicago and Eastern Illinois Railroad Co. v. People*, 214 *id.* 23.

It is insisted, however, on behalf of the appellant, that it is impracticable for the board of supervisors to state specifically the purposes for which the taxes are levied. This question was considered in the cases above cited, and we held in the first case that for the same reason that town meetings and city councils were required by the statute and the decisions of this court, to specify the purpose for which the tax was levied, the county board should be required to do so; and we said in *Chicago, Burlington and Quincy Railroad Co. v. People*, *supra*: 'This requirement gives the tax-payer an opportunity to know for what purpose taxes are being levied and collected, and gives him an opportunity, if necessary, to prevent unjust levy and assessment. Taxes raised for county purposes include many different things, and these various

amounts and purposes can be ascertained by the county board the same as they are ascertained by other taxing bodies.' And in *Cincinnati, Indianapolis and Western Railway Co. v. People, supra*, after citing cases holding that the purpose for which town and city taxes are levied should be specified, we said: 'There is no distinction between this case, in so far as it affects the county tax, and cases arising under the statutes authorizing the levy of township and city or village taxes.' These cases are decisive of the question here involved.

We do not wish to be understood as holding that it is necessary in any case to describe minutely each purpose for which the tax is levied, but it is the duty of the authorities levying a tax under a statute which requires the purpose for which it is levied to be stated, to specify the various purposes with reasonable certainty. In this case the third item was levied for the payment of county claims, which would include claims of every kind which might be presented against the county. The statement in parenthesis, 'janitor's services, supplies, repairs, improvements and current expenses,' is indefinite as to how much is levied for the defraying of the expenses for each of said items and adds nothing to the general statement that the tax is levied for the payment of county claims. In other words, the amount to be expended for janitor's services, supplies, repairs, improvements and current expenses is stated in a lump sum of \$12,000, and this, under the foregoing decisions, is insufficient. * * *

In accordance with the foregoing decisions, therefore, we are of the opinion that a lump sum of money for salaries for employes of the House of Correction cannot be legally appropriated nor a tax levy made therefor.

Yours respectfully,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 14, 1912.

HON. JOHN E. TRAEGER, Comptroller.

Dear Sir:

You request the opinion of this department as to whether certain arrearages in the compensation to be paid under an

ordinance to the Chicago Sectional Electric Underground Company are a liability of the Commonwealth Edison Company.

On July 31, 1882, an ordinance was passed granting rights to Henry Corwith and his associates and their successors to construct, maintain, repair and operate in the public streets of the city, for a term of twenty-five years, a line or lines of wire or other electric conductors, together with all necessary feeders and service wires to be used exclusively for the transmission of electricity. (Special Ordinances of Chicago, 1898, Vol. 1, page 28.)

Section 6 of this ordinance grants the same rights to a corporation formed by the grantees, which corporation was the Chicago Sectional Electric Underground Company.

Section 9 provides for the execution of a bond in the sum of \$50,000 conditioned

“* * * to indemnify and save harmless the City of Chicago of and from all damages which may be occasioned, or which in any way may accrue, or arise, or grow out of the exercise by them or the survivors of them or their successors, of the privileges thereby granted.”

Section 10 provides that the liability of the grantees

“* * * to said city or to any person who may be injured by the exercise by them of any of the rights and privileges hereby granted shall not be limited by the penalty of said bond, nor shall the remedy against them, or their successors, as the case may be, be confined to said bond, it being understood that such remedy is merely cumulative, and that said City of Chicago, and any person or persons, shall have the same remedies against them, or their successors, as the case may be, as it or they would or might have if no such bond were given.”

On July 31, 1885, the foregoing ordinance was amended in certain respects, among others, by the addition of Section 13 (Special Ordinances, 1898, page 32), which provided that:

“There shall be repaid to the City of Chicago in installments of \$500.00 a month, upon the first day of each and every month hereafter until the whole shall be paid, the sum of \$10,000 which has heretofore been paid by the city for the right of using said system, and the

City of Chicago shall have the rights and privileges obtained by said payment free of charge."

It appears from your communication that regular payments were commenced by the Chicago Sectional Electric Underground Company, or its predecessors in interest, on December 31, 1885, and thereafter regularly paid during that and the succeeding year until a total of \$6,000 had been paid. It does not appear that the balance of \$4,000 has ever been paid.

On March 23, 1908, an ordinance was passed in favor of the Commonwealth Edison Company for a period of years. Section 8 of this ordinance provides as follows:

"In the event that the conduits heretofore laid in certain streets, alleys and other public places of the City of Chicago by the Chicago Sectional Electric Underground Company under an ordinance of the City of Chicago passed on July 31, 1882, in favor of Henry Corwith and others, their successors and assigns, and amended by an ordinance of the City of Chicago passed on December 9, 1885, both of which expired July 31, 1907, shall be acquired and taken by said Commonwealth Edison Company, as is understood to be contemplated, said Commonwealth Edison Company may permit the space in said conduits now occupied by other parties under leases from said Chicago Sectional Electric Underground Company, to be occupied until otherwise ordered by the City of Chicago by the same tenants substantially as heretofore, and with such relatively slight variations as may be found desirable for making connections with new buildings and for other purposes. In consideration of this privilege of renting space in said conduits to other parties, said Commonwealth Edison Company shall pay annually to the City of Chicago an amount equal to ten per cent. (10%) of its gross rentals or revenues received by it for all such space so rented, instead of the three per cent. (3%) required under other provisions of this ordinance."

The ordinance rights granted to the Chicago Sectional Electric Underground Company expired July 31, 1907, and having thus expired on that date the rights, privileges, franchises and immunities granted by that ordinance ceased to continue after July 31, 1907, and could not be acquired by the Commonwealth Company on March 23, 1908, as a successor to the Sectional Company.

To succeed to rights implies that rights exist to which a succession may be had, and after July 31, 1907, there were no such rights in favor of the Sectional Company in existence. The physical property of the Sectional Company may have been acquired by lease or otherwise by the Commonwealth Company from the Sectional Company, but this implies no acquisition of any ordinance rights to maintain or operate the conduits for the very reason that such ordinance rights have expired.

I am therefore of the opinion on this branch of the case that there is no liability of the Commonwealth Edison Company to pay the arrearages of the Sectional Company as the former company is not the successor to the ordinance rights of the latter company and has in no way obligated itself under the ordinance of March 23, 1908, to pay or discharge any of the debts or obligations of the Chicago Sectional Electric Underground Company.

With regard to the remedies which the city has in the matter, I will go further than merely answering your inquiry and state that the city has a remedy against the bondsmen under the bond required by Section 9 of the Sectional Ordinance, and also that the city has a remedy against the original grantees under the ordinance.

I also suggest that the city has the privilege by council order to refuse to allow the space in said conduits to be occupied by the tenants of the Commonwealth Edison Company who were tenants on March 23, 1908. The recision of such rights by the city will, of course, deprive it of the ten per cent. gross rentals received from the Commonwealth Edison Company as compensation for this space. Moreover, it is extremely doubtful whether, in the event of the city's terminating the Commonwealth Company's right to rent out the space in these conduits, whether the Commonwealth Company will have any ordinance rights in and to these conduits.

Yours respectfully,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 16, 1912.

HON. LAWRENCE E. MCGANN, Commissioner of Public Works.

Dear Sir:

The Bureau of Engineering submitted a number of papers, including specifications, summary of bids, schedule showing basis of comparison, and a letter to you, all bearing on the awarding of the contract for four centrifugal pumps, on which bids were recently opened.

Your letter to this department set forth that your specifications called for a stated price and that in addition thereto it was announced in the specifications that the best bid would be determined by a comparison of the "duty guarantee and of the time of completion." The only question that you ask is whether it is essential, under the terms of the specifications, in determining the best bid to consider the time of installation and "duty guarantee."

While we could answer this question very readily by pointing to the wording which appears in these specifications, which we believe makes such a course imperative, we think it better, in view of the fact that the writer threshed out the whole question with the two leading bidders, to review in detail just what took place and how we arrive at our conclusion.

The city asked for bids on these pumps, and set forth in the specifications as one of the conditions that had to be adhered to in the bidding, the following:

"Any proposal not in conformity with the requirements of the city as herein stated will be rejected."

There is no ambiguity about that sentence, and in order to bring himself within the terms of the competition, it was necessary first of all for every bidder to make his proposal conform with the specifications and the precise requirements set forth therein. One of the requirements set forth in the specifications, and the only one which is involved in the controversy, is that relating to diffusion vanes. Under this head it was required that—

"Renewable bronze diffusion vanes or rings shall be provided which shall properly guide the water and prevent eddies."

It therefore appears that, in order to bring himself within the specifications and within the terms of the competition, every bidder should have included in his proposition the placing of renewable diffusion vanes or rings on the pumps which are to be constructed.

The specifications also contain the following language:

“All other requirements being complied with, the basis of comparison of bids will be comparison prices derived as follows:

From the price stated by each bidder there will be deducted:

First—A sum equal to one-thousandth of a dollar (\$0.001), multiplied by the number representing the number of foot pounds by which the duty guaranteed in the proposal exceeds seventy-eight million (78,000,000).

Second—A sum equal to fifty dollars (\$50.00), multiplied by the number representing the number of days that the time of completion guaranteed in the proposal is less than one hundred and eighty (180) days.”

When the bids were received it seems that two bidders, H. R. Worthington Co. and Allis-Chalmers Co., each put in two proposals.

The bids of the Allis-Chalmers Co. both come within the terms of the specifications. In fact this company, in submitting their own specifications with their proposals, stated the following:

“Specifications written to explain details of pumping unit and not to replace city’s specifications.”

Consequently, while no mention is made in this company’s specifications of diffusion vanes the words above quoted leave no doubt as to the intention of the bidders in regard to following the city’s specifications, and therefore both bids of the Allis-Chalmers Co. were within the terms of the competition and had to be considered.

H. R. Worthington Co. submitted one proposal (Proposal A) which comes squarely within the specifications and must be considered. In regard to the other proposal, which they called Proposal B, they wrote the following in their letter accompanying the proposal, addressed to the Commissioner of Public Works:

“Proposal ‘B’ covers the same equipment with the

exception that the pumps will be furnished with open diffusion throats surrounding the impellers instead of the removable diffusion rings as called for by your specifications. This is our standard construction for pumps of the multi-rotor type for heads up to 150 feet, and on account of the variation in capacity and head which the pumps will be subjected to in operation, we believe the open diffuser will give better results than the diffusion rings."

It will be seen at once, according to their own statement, that the Worthington people did not regard their Proposal B as in conformity with the city's specifications. However slight the difference may be, and even though their standard construction might be just as good or better, the city having stipulated that all requirements must be met, this bid is outside of the competition.

The bids when opened showed that the Allis-Chalmers Co.'s Proposal A fixed the price at \$90,500.00, and their Proposal B at \$83,500.00; but by credits received through the operation of the rule for comparisons laid down in the specifications, both of their bids were reduced for the purpose of a basis of comparison to \$73,000.00. The latter sum represents not the amount to be paid by the city for the pumps, but the basis on which their bids are to be compared with other bidders by reason of efficiency and time of delivery.

In the case of the Worthington people, their Proposal A contemplated a price of \$81,281.00, which for the purpose of comparison, under the terms of the specifications, was reduced to \$75,281.00; and their Proposal B, which fixed the price at \$77,131.00, was reduced in the same way to \$72,631.00.

It will be seen from the above figures that so far as actual price to be paid is concerned, the higher Worthington bid is less than the lower Allis-Chalmers Co. bid, but both of the Allis-Chalmers Co. bids, on the basis of comparison fixed in the specifications, are lower than Proposal A of the Worthington Co. although higher than Proposal B of the Worthington Co.

The Worthington people now say that their lower bid contemplated the use of diffusion rings, and that if the city

insists on having them removable (or as stated in the specifications "renewable"), it will supply them. Consequently, if the city could accept this bid, the sum of \$6,369.00 could be saved to the city and full efficiency be secured, since the engineers state that they are satisfied that either company will supply pumps that will meet all requirements.

The only reason for refusing to avail yourself of this reduced price is that it would not be fair to the other bidder to permit what would in fact be a revision of the Worthington Co.'s bid. If it were possible to award the contract to the Worthington Co. on the Proposal A, then it would be manifest that if you desired to take Proposal B as amended or modified you would have a right to do it.

It is for this reason that you have placed squarely before us the question as to whether it is necessary, in determining the best bid, to consider the time of installation and "duty guarantee."

We are of the opinion that since your specifications stated distinctly that the basis of comparison of bids would be arrived at in a certain way, you are bound to make the award in conformity with the bids as reduced to the basis of comparison in the manner required by the specifications. There seems to be no other fair course to pursue, and we assume that the city should take as fair a position in the matter as if it were a private party.

The only escape from this course, so far as we can see, is on the theory that possibly the difference between the actual price bid and the low price for which you could secure the same would warrant you in rejecting all bids, and either advertise again or submit the low proposal to the city council for action. From the information we have on the subject, however, we do not consider it proper to make such a recommendation, and therefore give it as our opinion that you are bound to consider the time of installation and "duty guarantee," and to award the contract accordingly. This under the facts as presented to us would give it to the Allis-Chalmers Co.

We return herewith letter dated October 31, 1912, from the city engineer and the mechanical engineer in charge to

the Commissioner of Public Works, also copy of specifications and the schedules submitted.

Yours respectfully,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 16, 1912.

HON. J. A. SWIFT, Alderman 30th Ward, Chicago.

Dear Sir:

We are in receipt of your communication requesting an opinion as to the right of a bridal couple to give away intoxicating liquor to their guests at a celebration held in a hall rented for that purpose and whether, if the hall is in the rear of a saloon and the saloon is closed at 1 o'clock A. M. and the entrance between the saloon and the hall is locked up at that time and the intoxicating liquor has been purchased by the bridal couple prior to that time, the law would prevent said bridal couple from giving away to their guests intoxicating liquors after said hour of 1 o'clock A. M.

The ordinance (sections 1525 and 1539 of the Chicago Code of 1911) forbids the sale, giving away or otherwise dispensing of intoxicating liquor in quantities of less than one (1) gallon by a person not licensed so to do.

We are of the opinion that the dispensing of intoxicating liquor at a gathering and under conditions, such as described in your communication, would constitute a violation of the ordinance, unless the intoxicating liquor is dispensed by a person or organization to whom a bar license has been issued, or by a person having a dramshop license covering the premises where the liquor is dispensed.

Under a dramshop license, no intoxicating liquor could lawfully be dispensed after 1 o'clock A. M.; that is between 1 o'clock A. M. and 5 o'clock A. M. A bar permit authorizes

the sale or dispensing of intoxicating liquor from 3 o'clock P. M. until 3 o'clock A. M.

Yours respectfully,

BRYAN Y. CRAIG,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 16, 1912.

HON. JOHN E. TRAEGER, Comptroller.

Dear Sir:

Replying to your letter of November 8, 1912, in're charging Water and Sewer Departments for permits to open the streets.

The City of Chicago operates its water system by virtue of Chapter 24, Article 254 of the Revised Statutes of Illinois (1908). Section 4 provides:

"The common council of such cities * * * shall have power to make and enforce all needful rules and regulations in the erection, construction and management of such waterworks."

Section 6 provides:

"All the income received by such cities, towns or villages from such water works, from the payment and collection of water taxes, rents or rates, shall be kept in a separate fund, and shall first be applied in the payment and discharge of the costs, interest on bonds or money borrowed and used in the erection and construction of such water works and *running expenses* thereof. And any surplus may be applied in such manner as the common council or board of trustees may direct."

The permit fee you desire to charge is necessitated by the inspection of the repairs after the pavement has been broken by the Water Department, in installing new service or in repairing old service. In either event the streets are broken for the benefit of the Water Department. The expense of inspecting the streets after the Water Department has left them may properly be charged to that department and paid by it as a part of the *running expenses* of the Water Department.

I am therefore of the opinion that the council may prop-

erly direct that the Water Department be charged for permits to open the streets, requested by it.

As to the Sewer Department, charges for permits are entirely within the discretion of the council.

The Sanitary District stands like any other corporation as to charges for permits to open the streets. The City Council or the Commissioner of Public Works may direct that the Sanitary District be charged for such permits.

Very respectfully,

GEO. L. REKER,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 18, 1912.

HON. ANTON J. CERMAK, Alderman 12th Ward, City.

Dear Sir:

You have requested an opinion from this department concerning the authority of the City Council to fix salaries of the newly elected chief justice and associate judges of the Municipal Court, also the newly elected bailiff and clerk of said court.

Speaking first of the judges: The statute governing the point in question (section 8 of the Municipal Court Act) provides that the salaries of the chief justice and associate judges shall be fixed by the City Council. It also provides a minimum salary and the maximum is limited to such salary or compensation as is received by a judge of the Circuit Court of Cook County. The Act then goes on to say that until the salaries have been fixed by the City Council the salary of the chief justice shall be \$7,500.00 per annum and the salary of the associate judge shall be \$6,000.00 per annum.

It does not appear that the salaries of either the chief justice or of the associate judges was ever fixed otherwise than by the appropriation ordinance.

It therefore follows that it is within the power of the City Council to prescribe what shall be the salaries of such judges. The salaries of sitting judges whose terms have not yet ex-

pired cannot be altered, but the salaries of incoming judges may be fixed at the present time.

What is true of the chief justice and the associate judges is also true in regard to the bailiff and clerk of this court.

Section 14 of the Act in question says that the salary of the clerk shall be fixed by the City Council, and provides a minimum of \$5,000.00. It also says that his salary shall not exceed the salary which may be fixed for an associate judge of the Municipal Court, and that it shall be neither increased nor diminished during the term for which the clerk shall have been elected. A similar provision also appears in the case of the bailiff.

Since there is nothing in the Municipal Court Act which prohibits the fixing of salaries before any officer takes his position and his term of office begins, and since the City Council has full power to fix such salaries, there seems to be no reason why the salaries of the chief justice, the newly elected associate judges, bailiff and clerk cannot be fixed at this time, always bearing in mind that the associate judges whose terms have been expired cannot participate in any increase during their present terms, and also that some provision must be made for the additional expense for the month of December, 1912.

Yours very truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

NOVEMBER 18, 1912.

HON. HUGO L. PITTE, Alderman, 20th Ward, Chicago.

Dear Sir:

We have before us your communication of October 30, 1912, making a number of inquiries hereinafter quoted, to the end that you may determine whether the City of Chicago may legally issue a license to conduct a dramshop upon any part of a certain plot of land described in your communication as lying on Milwaukee avenue between Nieman and Fulton Ave-

nues on the border line but beyond the boundary of the City of Chicago, if the same should be annexed to the City of Chicago.

By direction, we assume that the facts relating to the subject matter hereof are as follows:

In 1874, there was incorporated from the territory lying within the Township of Norwood Park, the Village of Norwood Park. The same year, immediately after its incorporation, the Village of Norwood Park adopted an ordinance prohibiting the sale of intoxicating liquors, or the licensing of dramshops within its territory. Within the Village of Norwood Park was included the property in question.

On November 7, 1893, the Village of Norwood Park was annexed to the City of Chicago, carrying with it into said City of Chicago the premises referred to. In 1912, these same premises were disconnected from the City of Chicago under section 206 of Hurd's Revised Statutes of 1911, page 315.

We assume also that all of the premises described in your communication were lawfully disconnected by strict compliance with the Statute last referred to, and that said premises now lie in the Township of Niles only and do not fall within the limits of any incorporated town, city or village; that the Township of Niles, at its last election held pursuant to the "Anti-saloon Territory," Act, page 959, Hurd's Revised Statutes of 1911, voted wet, and all towns and villages within said Township of Niles are now licensing dramshops.

THE QUESTIONS SUBMITTED AND THE ANSWERS THERETO.

(1) "Did the Village of Norwood Park prior to its annexation have power to disconnect the territory in question?"

(A) In 1893 when the Village of Norwood Park was annexed to the City of Chicago, there was in full force and effect an act entitled, "An Act in relation to the disconnection of territory from cities and villages," approved and in force May 29, 1889 (See Starr & Curtis Ann. Stat. of Ill. Vol 1, page 796, section 213 *et seq.*). Under that act, the Village of Norwood Park prior to its annexation had the power to disconnect the territory in question if that territory lay upon the border and within the boundary of said village and was not laid out into village lots or blocks.

(2) "If so, would the disconnection of this territory from the original Village of Norwood Park prior to its annexation have removed the premises in question from the operation of the liquor ordinances of Norwood Park?"

(A) If the territory had properly been disconnected from the original Village of Norwood Park by strict compliance with the act relating to the disconnection of territory hereinabove referred to, all ordinances in force prior to such disconnection and all authority of the officers of the Village of Norwood Park would have ceased to have any further force and effect immediately upon the disconnection of such territory, except that such territory would not be exempt from taxation for the purpose of paying any indebtedness contracted by the corporate authorities of the Village of Norwood Park, while such territory was within the limits thereof, and remaining unpaid. The liquor ordinances of the Village of Norwood Park, therefore, would cease to have any force and effect in the territory in question upon the disconnection thereof from said Village of Norwood Park.

(3) "If the Village of Norwood Park had disconnected the premises in question prior to its annexation, would section 228 Hurd's Statutes, page 323, have any legal force as against these premises now?"

(A) Section 228 is in part as follows:

"When a part or the whole of an *incorporated* town, village or city is annexed, under the provisions of this Act, to another city, village or incorporated town and prior to such annexation an ordinance was in force prohibiting the issuing of licenses to keep dramshops within the said territory so annexed, or any part thereof, or providing that such licenses shall not be issued except upon petition of a majority of the voters residing within a certain distance of such proposed dramshop, then such ordinance shall continue in full force and effect, notwithstanding such annexation."

It will be seen that the foregoing provision relates only to the annexation of a part or the whole of an *incorporated* town, village or city. Inasmuch as the premises in question are no part of an *incorporated town*, section 228 will have no application in the event that the described territory is annexed to the City of Chicago.

(4) "Would the annexation of Norwood Park to the City of Chicago confer upon the City of Chicago all the rights and powers of the original Village of Norwood Park?"

(A) No, but the ordinances of the City of Chicago would immediately extend over the annexed territory, excepting that under section 228, chapter 24, Hurd's Revised Statutes of 1911, hereinabove referred to, certain ordinances limiting the power of the Village prior to its annexation to issue dramshop licenses would continue in full force and effect after annexation until such ordinance or ordinances were repealed in the manner provided in said section.

(5) "What method could be adopted and to what authority or officers could the question of voting as required under said section 228, page 323, be submitted considering the present status of the premises?"

(A) Inasmuch as section 228 referred to does not apply to the premises in question under its present status or after its annexation to the City of Chicago, as heretofore held in answer to the third question, such a vote as is required under said section 228 can not be submitted to any authority or officers having jurisdiction over that territory.

(6) "Is said section 228 intended to apply only while the whole of any territory annexed remains intact as a whole, and do the statutes in any manner intend that this section shall apply to any parts of the whole territory which may be disconnected?"

(A) Section 228 refers to annexation only and has no bearing upon the disconnection of territory or disconnected territory.

(7) "Considering that the territory now lies wholly within the Township of Niles, would the vote by the Township of Niles, at its last election, be a sufficient 'consent of the voters of the territory as affected' as required by said section 228?"

(A) The vote by the Township of Niles referred to having been taken under "Anti-saloon Territory" Act, such vote can have no possible relation to section 228 referred to.

It will be seen from the foregoing questions and the answers thereto that the answer to the paramount question

apparently underlying those directly submitted for our consideration is rendered most obscure by reason of the lines of inquiry toward which our attention is specifically directed.

That question simply stated is, will the City of Chicago have legal power and authority to issue a dramshop license in the territory described, if the same shall be annexed to the City of Chicago, free and clear of any limitations existing in said territory prior to its disconnection from the City of Chicago by reason of having once been a part of the Village of Norwood Park, and as such having been annexed to said City of Chicago.

We are of the opinion that if the territory described was properly and lawfully disconnected from the City of Chicago, the liquor ordinances in force in that territory prior to its disconnection had no further effect therein.

We are further of the opinion that if said territory should now be properly and lawfully annexed to the City of Chicago, all of the general ordinances in force in the City of Chicago at time of the annexation will extend immediately over the annexed territory.

People ex rel City of Chicago v. Chicago Telephone Company, 220 Ill., page 238.

Respectfully submitted,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 19, 1912.

HON. EUGENE BLOCK, Chairman, Committee on Local Transportation, Chicago.

Dear Sir:

Replying to your letter, dated October 14, 1912, addressed to William H. Sexton, Corporation Counsel, requesting this department to furnish the Committee on Local Transportation draft of an ordinance requiring all the elevated railroad cars operated in the city to be equipped with vestibules, we beg to state that we have prepared such draft and transmit same herewith.

We believe that the city is empowered to pass the foregoing ordinance under either or both of the following clauses of the Cities and Villages Act.

“Forty-second. To license, tax and regulate hackmen, draymen, omnibus wrivers, carters, cabmen, porters, expressmen, and all others pursuing like occupations, and to prescribe their compensation.”

“Sixty-sixth. To regulate the police of the city or village, and pass and enforce all necessary police ordinances.”

In the case of *Gundling v. City*, 176 Ill., 340-346, the court held that the city may predicate its right to pass an ordinance upon any single provision of either the Cities and Villages Act, or its special charter, or upon any combination of two or more of such provisions or upon all of them combined.

Yours respectfully,

MAX M. KORSHAK,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Acting Corporation Counsel.

NOVEMBER 20, 1912.

HON. JOHN A. RICHERT, Chairman, Finance Committee.

Dear Sir:

We have in our possession for the purpose of rendering an opinion thereon, as by your honorable committee requested, the claim of Morris & Company for the refund of \$804.40, discount on water bill paid under protest covering period beginning December 7, 1911, and ending January 17, 1912, and after reading and investigating the affidavits thereto attached, and after taking up the matter with the water office, and after investigating the law applicable thereto, we are of the opinion that said claim for \$804.40 must be declined for the following reasons:

First, that the affidavits above referred to are insufficient because they fail to satisfactorily trace the check in question *alleged to have been lost*;

Second, that the act by reason of which the check was

lost occurred most likely in the mailing room of Morris & Company, and is a matter of negligence to be charged to Morris & Company and not to the City of Chicago.

Third, waiting until the 24th day of February, 1912 (one day before the expiration of the discount period) is negligence in itself.

We have taken notice of the contention of Morris & Company, wherein they state that the City of Chicago used the same agent in forwarding the water bill as Morris & Company did in forwarding the check in payment thereof, to-wit, the post office department. Upon an investigation of the law, we find that the above alleged matter of agency binds both parties only in the matter of an acceptance and an offer in the inception of a contract about to be entered into by two parties, and we must hold that this rule is not applicable where payment by check has been made in the case of an already consummated contract wherein nothing was agreed upon by the parties as to the manner or mode of payment. Payment by check is not absolute, but is merely a conditional mode of payment.

Furthermore, it always has been a custom of the water office not to consider anything as payment of a water bill, except the actual arrival of a check or the actual presentation of the same in the office of the Bureau of Water. The water office has always steadfastly adhered to this rule and will continue to do so at all times in the future, for the reason that if it did not, the City of Chicago would be subjected to the practice of deceit and to a great deal of trouble, litigation and annoyance and would be deprived of thousands of dollars of revenue.

All consumers of water will find the following statements upon every meter bill that is presented to them for payment: "All meter bills payable at Bureau of Water," "Failure to receive this bill does not entitle consumer to discount," "Bring this bill with you." We believe these statements plainly point out to every consumer that he must actually

have paid his bill at the water office within the thirty day discount period if he desires to avail himself of said discount.

We respectfully recommend that said claim be declined.

Yours very respectfully,

J. J. VITERNA,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Acting Corporation Counsel.

NOVEMBER 27, 1912.

CIVIL SERVICE COMMISSION, Chicago, Ill.

Gentlemen:

We have your communication of October 21, 1912, inquiring whether the persons holding the positions of superintendent of construction, chief fire alarm operator, fire alarm operators and chief of electrical repairs may be paid through the department of electricity instead of the fire department without affecting their pension rights.

In 1898 the City Council of the City of Chicago established the department of electricity. Prior to that time the work of that department was performed under the supervision of the fire marshal. Those employes of the City of Chicago, who were in the electrical service prior to 1898, were appointed by the fire marshal, subject to the control and supervision of the fire marshal, and paid by appropriation ordinances for the fire department. Therefore, they were members of the fire department and entitled to pensions under the Act of 1887 establishing a pension fund for members of the fire department.

Leffingwell v. Kiersted, et al., 65 Atlantic (N. J. Sup.) 1029.

When the department of electricity was established it became necessary for the good of the service to transfer those members of the fire department, who were then performing electrical service, to duty in the department of electricity. Many of those men, however, had been members of the fire department a great many years and had accepted positions in that department, and a portion of their salaries had been de-

ducted during their service in the department for the pension, fund in view of the fact that they would be entitled to pensions under the law.

The City Council therefore provided in establishing the department of electricity that all operators who were then members of the department, or who might thereafter become members of the department, including the then superintendent of construction, should be assigned to duty to the chief electrician, but that nothing contained in the ordinance creating the department of electricity should be construed as separating these men from the fire department.

William Carroll at that time held the position of superintendent of construction. We believe that it was intended by the ordinance that after William Carroll had ceased to occupy the position of superintendent of construction, that position should thereafter be included in the department of electricity and not in the fire department.

We quote that part of the ordinance establishing the department of electricity, as passed in 1898, to bear out our statement.

“800. DEPARTMENT ESTABLISHED.) There is hereby established an executive department of the municipal government of the city, which shall be known as the department of electricity, and which shall include a city electrician, an assistant city electrician, *a superintendent of construction*, a secretary, one chief inspector and such other assistants and employes as the city council may by ordinance provide.

* * * * *

“803. All those operators, including the *present* chief of construction of the fire alarm telegraph, who at present are or who may hereafter be members of the fire department, shall be detailed for duty by the fire marshal to the city electrician, and this article shall in no way be construed as separating them from said fire department.”

It so happens, however, that in 1906, after William Carroll had been appointed to the position of chief electrician, the present incumbent of the position of Superintendent of Construction, Harry Leser, was certified by the Civil Service Commission and appointed by the fire marshal to that position,

and he has ever since been paid through an appropriation for the fire department.

In our opinion Mr. Leser was improperly certified to and appointed a member of the fire department, and his appointment should have been to the position of superintendent of construction in the department of electricity.

In 1911 when the ordinances of Chicago were revised and codified, section 826 of that code again contained that provision originally incorporated in the ordinance establishing the department of electricity relating to the operators and chief of construction of the fire alarm telegraph. We quote that portion from the Chicago Code of 1911 referred to:

“826. All other operators including the *present* chief of construction of the fire alarm telegraph, who at present are or who may hereafter be members of the fire department, shall be detailed for duty by the fire marshal to the city electrician, and this article shall in no way be construed as separating them from said fire department.”

By the foregoing ordinance, the present Chief of Construction, Harry Leser, was again recognized by the City Council as a member of the fire department.

Undoubtedly it was the intention of the City Council to place all men doing electrical work under the supervision of the city electrician without affecting the pension rights of those persons who were already members of the fire department.

We have consulted with Fire Marshal Seyferlich in regard to this matter, and we are agreed that while the pension rights of those who are now holding positions in the fire department as electrical workers or operators should not be prejudiced, the future action of the Civil Service Commission, if the City Council shall approve of it, should be so directed as to exclude all operators or electrical workers hereafter entering the service from any rights under the Firemen's Pension Act, which no doubt was passed to protect active firemen engaged in their extra hazardous employment.

To that end we have, therefore, taken the liberty of drafting two (2) ordinances revising five (5) sections of the code of 1911, which we believe will protect the rights of those who are

now employed in the fire department, as well as cut off from the benefits of the Firemen's Pension Act those who shall hereafter enter the electrical service in any capacity.

It will be seen from the drafts of the ordinances, which we herewith submit for your consideration, that the difficulty in the matter of accounting resulting from making appropriations for the fire department to pay those members thereof, who are actually performing duty for the department of electricity, is therein met.

We are of the opinion that an appropriation ordinance providing for compensation of a person in a particular department does not of itself create a position or office in such department, and standing alone, does not make the person, whose compensation is so provided for, a member of that department.

Moon v. Mayer, 214 Ill. 40.

Bullis v. City, 235 Ill. 472, 476.

Since the receipt of your communication, hereinabove referred to, Mr. Jacobs, of the Efficiency Bureau of your Commission, has advised this department that if new ordinances are drafted revising those establishing the department of electricity and the fire department, it would be well at the same time to incorporate therein such features as would enable the city and state to hold liable most of the employees in these departments in the performance of their duties as officers.

To that end we have consulted with the City Electrician, the Fire Marshal and Mr. Jacobs of the Efficiency Bureau, and have drafted the ordinances along the lines suggested by them. We are not, however, thereby assuming to pass upon the wisdom of this feature of the ordinances.

Respectfully submitted,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 30, 1912.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

You have referred to this department an ordinance fixing the salary of the Chief Justice of the Municipal Court, with an inquiry as to whether the same would become effective during the next term of said chief justice if the same were not approved before his induction into office.

The question presents itself in two different aspects. The first question is whether an ordinance that is not approved through the signature of the Mayor but is not vetoed by him becomes effective at the time the same is passed or at the expiration of the period within which it may be vetoed.

Our Supreme Court has not passed on the statute now in force relating to the veto power of the Mayor, but it passed on a somewhat similar statute which was in force in the year 1866. In holding that under that statute the ordinance did not take effect until the expiration of the time given to the Mayor to veto same, the Court used language and gave a reason which applies with equal force to the statute as it exists now. Said language is as follows:

“* * * It was again insisted, that if it is held to be an act, within the provisions of this section, under its provisions, it, by not being approved, took effect from the date of its presentation to the mayor for his approval. The section declares, that, if not approved or returned within five days after it is presented to the mayor, it shall take effect in the same manner as if he had signed it. It will not be contended, that such an act, signed by the mayor on the last day allowed him for consideration, takes effect from the day it is presented to him. It manifestly takes effect from the date of its approval. That is the last act necessary to its passage and to give it effect. Then when it is never signed by the mayor, how can it be said to take effect in the same manner as if signed by the mayor, when it is insisted that it takes effect at an earlier period than it would have done, if it had been signed by the mayor. He is allowed by law all of the five days for examination and consideration whether he will approve or return it with his objections, and the reasonable inference is, when he fails to approve, that he has employed the entire time for the purpose, and hence it only takes

effect from the last of the five days. It is perfectly obvious that such an act can have no binding force until it is signed by the mayor, or the entire time allowed him has elapsed. It is not binding up to the last moment, if not approved; then by what means does it take effect five days previously? By attaching his signature, it takes effect at that precise time, and so when the last moment of time has transpired without the action of the mayor, the law gives it effect from that time. There is nothing in the language of the act to authorize a different construction. * * *'' (*Skinner v. City of Chicago*, 42 Ill. 52.)

There has been no later expression of the Supreme Court on the point involved and the above stands as the law of the State.

The other phase of the question is whether such an ordinance would increase the salary of the chief justice, who has just been re-elected, if it did not take effect until after he entered upon his new term of office. On this point the language of the statute is as follows:

"* * * The salaries of the chief justice and associate judges shall be fixed by the city council: PROVIDED, HOWEVER, that the salary of the chief justice shall not be less than seven thousand five hundred dollars (\$7,500) per annum and that the salary of an associate judge shall not be less than six thousand dollars (\$6,000) per annum, and that the salary of no judge shall exceed the salary and compensation fixed, from time to time, by law for a judge of the circuit court of Cook county, and that the salary of no judge shall be increased or diminished during the term for which he shall have been elected: * * *"

If the new salary fixed by the ordinance in question did not begin until after the chief justice entered upon his term, then necessarily his salary would be increased during his term if the increase were to apply to him. This would be directly contrary to the statute. It would be difficult if the ordinance fixed the salary so that the increase would take effect some time in the future.

The word "judge" as used in the above excerpt applies to the chief justice as well as to the other judges—in fact the very section in which that excerpt appears begins with the words,

“§8. That said Municipal Court shall consist of twenty-eight judges, one of whom shall be chief justice and the remaining twenty-seven of whom shall be associate judges.”

It will therefore be seen that if the ordinance in question is to operate so as to increase the salary of the re-elected chief justice during the term on which he is about to enter, it must be signed before he begins the term. If it was not so signed before the beginning of that term and was allowed to become a law without the signature by the Mayor, after the chief justice had assumed his office for the coming term, the ordinance would still be effective, but it would not operate to raise the salary of the chief justice until after the next term of the chief justice had expired.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

NOVEMBER 30, 1912.

HON. RAY PALMER, City Electrician, Chicago.

Dear Sir:

We have your request of November 14, 1912, for an answer to the following questions therein propounded.

First: “What proportion of the power generated by the Sanitary District of Chicago is the municipality of Chicago entitled to demand as a legal right?”

Second: “Is there any legislative act or judicial decision that would give municipalities, villages and towns of the Sanitary District preference over other customers in the distribution of the power generated by the said district?”

Third: “Is there anything to prevent any municipality within the Sanitary District from obtaining more than its pro rata share of power generated, either by priority of use or tender of higher rate?”

At the outset, it is perhaps well to state that a careful search of the decisions of the Supreme Court of this state

and of our Appellate Courts has failed to disclose a single decision in which the subject matter of your inquiries has been given consideration. This department has, however, on at least two occasions submitted opinions relating to the same subject matter.

The first opinion was rendered on June 22, 1906, addressed to Hon. Frank I. Bennett, Chairman, Committee on Finance, by Mr. William D. Barge, Assistant Corporation Counsel, during the administration of this office by Colonel James Hamilton Lewis. In that opinion, this department held:

“That it was the intention of the Legislature that the power developed by the Sanitary District shall be for the use of the municipality and for municipal purposes and none other, if the municipalities within that district or adjacent to its main channel desire to have such power.”

It was also held that:

“Under this statute the Sanitary District has no right whatever to dispose of that power to individuals or private corporations unless it has first supplied all the municipalities entitled to such power with whatever power they may desire, or such municipalities have declined or failed to ask for such power. The intent of the Act is to authorize the Sanitary District to sell to persons and private corporations only the surplus over that amount required by municipalities for municipal purposes.”

It was also held in that opinion that:

“The Sanitary District can be compelled to furnish to the city the same proportion of the total power developed by the District that the Sanitary District taxes levied upon taxable property in the city bear to the total taxes levied for the District upon all the property within its limits, and this without any further cost or change to the city.”

The second opinion rendered by this department was on May 22, 1908, addressed to the Hon. Frank I. Bennett, Chairman, Committee on Finance, by Oscar H. Olsen, Assistant Corporation Counsel, under the administration of this office by the Hon. Edward J. Brundage. It was then held:

“That the matter of the sale of electrical energy by the Sanitary District to municipalities or others is placed

upon a private contract basis; that is, the price to be charged is a matter of mutual agreement between the parties."

It was also therein held that no municipality

"Could compel the Sanitary District to furnish such power; that it is optional with the Sanitary District after 'utilizing so much of said power as may be required for the purpose of operating the pumping stations, bridges and other machinery of said Sanitary District' to dispose of the surplus either to municipalities within said Sanitary District or adjacent to the main channel, or to dispose of the same to any other person or corporation, leaving it entirely within the discretion of the Sanitary District to dispose of the same only upon such terms as they are willing to accede to."

The Sanitary District of Chicago is a municipal corporation organized under an Act entitled, "An Act to create sanitary districts and to remove obstructions in the Desplaines and Chicago Rivers." Approved May 29, 1889, in force July 1, 1889 (See Hurd's Revised Statutes of 1911, p. 349).

Section 7 of that Act provides as follows:

"The board of trustees of any sanitary district organized under this act shall have power to provide for the drainage of such district by laying out, establishing, constructing and maintaining one or more main channels, drains, ditches and outlets for carrying off and disposing of the drainage (including the sewage) of such district, together with such adjuncts and additions thereto as may be necessary or proper to cause such channels or outlets to accomplish the end for which they are designed in a satisfactory manner; also to make and establish docks adjacent to any navigable channel made under the provisions hereof for drainage purposes, and to lease, manage and control such docks, and also to control and dispose of any water-power which may be incidentally created in the construction and use of said channels or outlets, but in no case shall said board have any power to control water after it passes beyond its channel, waterways, races or structures into a river or natural waterway or channel, or water-power or docks situated in such river or natural waterway or channel: Provided, however, nothing in this act shall be construed to abridge or prevent the State from hereafter requiring a portion of the funds derived from such water-power, dockage or wharfage to be paid

into the State Treasury to be used for State purposes. Such channels or outlets may extend outside of the territory included within such sanitary district and the rights and powers of said board of trustees over the portion of such channel or outlet lying outside of such district shall be the same as those vested in said board over that portion of such channels or outlets within the said district."

It will be seen from the foregoing section, that the purpose of the organization of sanitary districts under that Act is to protect the health of the inhabitants within the district by providing for a system of drainage for the carrying off and disposing of the district's sewage, etc. The Legislature, however, recognized that in providing for the construction and maintenance of channels, drains, etc., for the objects of the incorporation of a Sanitary District, valuable property rights would incidentally be created, and therefore the section above quoted gives to the Sanitary District created, such incidental powers as to make and establish docks, and to lease, manage and control the same and also to control and dispose of any water power which may be incidentally created in the construction and use of the channels or outlets controlled by the Sanitary District.

The last mentioned powers of Sanitary Districts have been held to be germane to their main corporate purposes, and the control and utilization of the dock privileges and water power incidentally resulting from the prosecution of their corporate enterprises are legitimately given by the Legislature to Sanitary Districts, for the purpose of raising revenue to carry out the main objects of incorporation.

People v. Nelson, 133 Ill. 565.

If the power to dispose of the electrical energy created by the water power naturally and incidentally arising from the creation and maintenance of the channels of the Sanitary District of Chicago rested solely upon the section of the Statute hereinabove quoted, we should be inclined to concur with the opinion rendered during Mr. Brundage's administration of this office, *i. e.*, that the duty of disposing of such electrical energy and the terms of the disposition thereof would be a matter lying within the exclusive control of the Board of Trustees of the Sanitary District, by contract with the mu-

municipalities or with private persons or corporations with whom and upon what terms said Board saw fit to contract for its disposition. In that event, the answers to all of your questions would be thus disposed of.

But the power of the Sanitary District of Chicago to dispose of electrical energy does not now arise as an *incident* to its power to construct and maintain channels for the carrying off and disposition of drainage.

In 1903, the Legislature, by an Act entitled, "An Act in relation to the Sanitary District of Chicago to enlarge the corporate limits of said District and to provide for the navigation of the channels created by such District and to construct dams, water wheels and other works necessary to develop and render available the power arising from the water passing through its channels and to levy taxes therefor," (See Hurd's Revised Statutes of 1911, p. 359), gave to the Sanitary District of Chicago, as an *independent* and *co-ordinate* power, the right to *artificially develop* the water power latent in the channels controlled by the District, and for that purpose authorized the Sanitary District of Chicago to levy taxes upon all of the taxable property within the corporate limits of the District.

We quote that portion of the Act of 1903 referred to, which relates to the subject matter of our investigation.

"§ 5. That the said sanitary district of Chicago is hereby authorized to construct all such dams, water-wheels and other works north of the upper basin of the Illinois and Michigan Canal as may be necessary or appropriate to develop and render available the power arising from the water passing through its main channel and any auxiliary channels now or hereafter constructed by said district."

"§ 6. That the power made available by the works constructed under the provisions of this act shall be converted into electrical energy and shall be transmitted to the various cities, villages and towns within said sanitary district or adjacent to the main channel of said sanitary district and may be used in the lighting of said cities, villages and towns, or parts thereof, or for the operation of pumping plants or machinery used for municipal purposes or for public service, or may be disposed of to any other person or corporation, upon such terms and condi-

tions as may be agreed to by the said sanitary district; Provided, however, that it shall be the duty of said sanitary district to utilize so much of said power as may be required for that purpose to operate the pumping stations, bridges and other machinery of said sanitary district."

"§ 7. That for the purpose of meeting the expenditures arising from the exercise of the powers conferred by sections five and six of this act upon the said sanitary district, the said sanitary district of Chicago is hereby authorized to levy and collect in each year, for a period of three years (in addition to the taxes which said district is now by law authorized to levy and collect) a tax of not exceeding one-fourth of one per cent of the value of taxable property within the corporate limits of said district, as the same shall be assessed and equalized for the State and county taxes of the year in which the levy is made: Provided, further, that the county clerk, in extending said one-fourth of one per cent tax upon the taxable property within said sanitary district, shall not in any event reduce the same but in that respect said one-fourth of one per cent shall not be subject to the provisions of an act entitled, 'An act concerning the levy and extension of taxes,' approved May 9, 1901."

The power to develop the water power referred to and to convert the same into electrical energy for transmission to cities, villages and towns and the disposition thereof to such cities, villages and towns for municipal purposes or for public service or to any private person or corporation is, therefore, a distinct municipal enterprise which, by reason of the fact that it is initiated by *public revenue*, must be devoted to the *public use* and therefore subject to the principles of law applicable to municipal corporations engaged in a private or proprietary enterprise as distinguished from the performance of a governmental function.

If our conception of the power of the Sanitary District of Chicago, in this respect, is correct, section 6 of the Act of 1903 can not be so construed as to give unlimited discretion to the Sanitary District in the disposition of its electrical energy.

To Illustrate: The Sanitary District of Chicago could not dispose of all of its electrical energy to one or more private persons or corporations and permit these private per-

sons or corporations to derive a profit from its re-sale to the public. To construe the Act as a grant of such power, would be to lose sight of the fact that the Sanitary District of Chicago is not a corporation created for private gain or for profit at the expense of the public, which is compelled to raise the money by taxation for the establishment and maintenance of that enterprise.

Again, if the discretion of the Sanitary District of Chicago in the disposition of its electrical energy were unlimited, the Board of Trustees might contract to sell such electricity to John Jones at one price and to Richard Smith, his next door neighbor engaged in the same business and under like conditions, for a higher rate. The power of the Sanitary District could be thus used to give one taxpayer in the district an advantage over another in the pursuit of business enterprise.

And yet, we cannot place the construction of the Act of 1903 for which Mr. Barge, in his opinion, has contended, that is, that the Sanitary District can be compelled to furnish to the city the same proportion of the total power developed by the District that the Sanitary District taxes levied upon taxable property in the city bear to the total taxes levied for the District upon all the property within its limits, and this without any further cost or charges to the city. Such a construction of that Act, it seems to us, is contrary to the plain language thereof.

Recurring to section 6 of the Act of 1903, hereinabove quoted, it will be seen that after providing "that the power made available by the works constructed under the provisions of the Act *shall* be converted into electrical energy and *shall* be transmitted to the various cities, villages and towns within said Sanitary District or adjacent to the main channel of said Sanitary District," provides further that such electrical energy "*may* be used in the lighting of said cities, villages and towns, or parts thereof, or for the operation of pump ing plants or for machinery used for municipal purposes or for public service, *or* may be disposed of to any other person or corporation, upon such terms and conditions as may be agreed to by the said Sanitary District." The phrase "upon such terms and conditions," etc., qualifies every clause in that para-

graph relating to the use or disposition of the electrical energy. If it limited only the disposition of electricity "to any other person or corporation" there would be no comma after "corporation."

Moreover, the construction of section 6, by Mr. Barge would place the burden of taxation under section 7 upon those citizens within the Sanitary District residing beyond the limits of any city, village or incorporated town, although they could derive no benefits therefrom by reason of the fact that they could get none of the electricity for their own use nor would their taxes levied for drainage purposes be reduced because the Sanitary District would receive no revenue from the development of its water power.

Suppose then under the terms of the Act, the Sanitary District of Chicago had developed the water power as provided therein and transmitted the same to the various municipalities for disposition, and the municipalities, for some reason or other, were unable or unwilling to buy all the electricity transmitted to them or which said Sanitary District offered to transmit and sell to them upon such reasonable terms and conditions as the Sanitary District imposed, there is no doubt that said Sanitary District could, in that event, sell such electricity to any private person or corporation. And suppose further that in the selling of such electricity to private persons or corporations, it became necessary for good business reasons to make contracts for a reasonable length of time, could it be said that before the expiration of such reasonable length of time, the Sanitary District could be compelled to break its contracts with private persons or corporations to satisfy the demands of any municipality? We believe that such a construction of the Statute would be a most unreasonable one.

We do believe, however, that the language of the Act indicates an intention that the cities, villages and towns within the Sanitary District or adjacent to the main channel of said District should be preferred in the matter of the disposition of the electrical energy generated from the water power of the channel, and that therefore, subject to the rights of any private person or corporation to such electricity which the Sanitary District has contracted to deliver for a reason-

able length of time, the municipalities referred to are entitled to preference and that the City of Chicago is entitled to all the electrical energy generated by the Sanitary District not used or demanded for municipal purposes in other cities, villages and towns, as soon as the contracts of the Sanitary District with private persons or corporations should expire.

We are of the further opinion that if the Sanitary District has made any contracts for the sale or disposition of its electricity for any unreasonable length of time, such contracts are *ultra vires* and may be nullified by a suit brought by any municipality to compel the Sanitary District to furnish it with electricity for municipal purposes.

We are further of the opinion that while the Sanitary District has power to impose the terms and conditions upon which it will sell its electricity to municipalities or private persons or corporations, such terms and conditions must be reasonable and uniform as to persons or corporations under like circumstances.

More specifically and categorically answering the questions submitted to us, we are of the opinion:

First: That the City of Chicago is not entitled to demand as a legal right any specific proportion of the power generated by the Sanitary District, but that it may demand all the electricity generated by the Sanitary District which is not used by other municipalities entitled to electricity, except such as is used by the Sanitary District itself for the purpose of operating the pumping stations, bridges and other machinery of said Sanitary District, and excepting further, such electricity as is now contracted for by private individuals or corporations for any reasonable length of time.

Second: There is no judicial interpretation, but section 6 of the Act of 1903 referred to, may be interpreted to give the municipalities in the Sanitary District or adjacent to its main channel preference over other customers in the distribution of the power generated by the District.

Third: The Sanitary District has no right to discriminate between municipalities as to rates charged, providing, however, that the rates may reasonably differ, depending upon the difference in cost of transmission and the amount of electricity used by various municipalities, but it is within the

sound discretion of the Sanitary District to distribute its electricity to the various municipalities in the proportion that the Board of Trustees may deem advisable. In the absence of any other method of determining what proportion of electricity Chicago is reasonably entitled to, we suggest the method adopted by Mr. Barge with slight modification; that this city be given the same proportion of the total power developed by the District that the Sanitary District taxes levied upon taxable property in the city bear to the total taxes levied upon all the property within the limits of all municipalities demanding electricity.

Respectfully submitted,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

DECEMBER 4, 1912.

HON. JOHN E. TRAEGER, City Comptroller, Chicago.

Dear Sir:

In the matter of your letter of November 10, 1912, *in re* Palmbla contract.

You say that a recent report of the auditor shows that for a certain year in which the contract has been in force, the city has received less money for redemption than the amount it paid out to acquire the deeds. You ask if for this reason you should now decline to pay Palmbla for 189 deeds which he secured, the voucher for which is now in your office ready for delivery.

The Palmbla contract is similar in terms to the contract of the tax agent for a number of years. It provides that Palmbla shall be paid by the city Nine (\$9.00) Dollars for each deed which he procures, and that he shall incorporate "as many pieces of property as practicable in each deed in order to keep down the cost to the city." It also provides that Palmbla

"Shall pay to the city the face amount of all tax deeds settled or sold and in addition thereto the city's expense in obtaining such deed, (which is hereinafter

fixed at the uniform rate of \$9.00 for each deed), * * * such payment to be made to said city upon the delivery of a quit-claim deed executed by said city."

It also provides:

"The city of Chicago shall execute a quit-claim deed or deed for property acquired by it through tax sales when application therefor shall be made to the city comptroller by (Palmbra), subject, however, to the approval of the Chairman of the Finance Committee, such quit-claim deed to be signed by the Mayor and the City Clerk."

Three questions are presented. *First*: In the matter of 189 deeds in question has Palmbra incorporated "as many pieces of property as practicable in each deed in order to keep down the cost to the city?" *Second*: Should the language of the contract

"Said party of the first part shall pay to said city the face amount of all tax deeds settled or sold, and in addition thereto the city's expense in obtaining such deed, (which is hereinafter fixed at the uniform rate of \$9.00 for each deed)"

be construed as meaning Nine (\$9.00) Dollars for each quit-claim deed or Nine (\$9.00) Dollars for each tax deed incorporated in the quit-claim deed? *Third*: If the above clause has been improperly construed in previous dealing with Palmbra and his predecessors, should the claims of the city be set off against the fees for the 189 deeds?

Answering the first point. Your office was not able to give me the identical deeds upon which the present claim is based. These have been mixed with others procured during the year. From the deeds procured during the year, I selected sixty at random. These, I believe, fairly showed the character of all of them. Upon examination of these, I find no instance in which more property could have been placed in one deed than was done.

You could decline to pay the voucher if you could prove that he did not incorporate "as many pieces of property as is practicable in each deed." The showing above made, however, does not support this contention.

Answering Point 2. I am of the opinion that the only interpretation to which the language of the contract is open,

is that Nine (\$9.00) Dollars should have been charged for each tax deed incorporated in a quit-claim deed.

Answering Point 3. It was the duty of the city, through its proper officers, when the quit-claim deeds were delivered to have insisted upon the necessary amount in payment therefor. It is doubtful if the city can now claim the other interpretations of the contract after it has permitted the tax agent for several years to proceed upon the construction that Nine (\$9.00) Dollars was to be paid for each quit-claim no matter how many tax deeds may have been included therein. The tax agent might properly claim that Nine (\$9.00) Dollars in each instance was all he secured from the person making the redemption. Furthermore, from the fact that for a certain year a smaller amount was received for quit-claim deeds than was paid to acquire the tax deeds, it does not necessarily follow that the deficit is chargeable to the Palmbla contract. To establish what items produced the deficit would require the tracing of the subject matter of every quit-claim deed executed during that year, as it is apparent that Palmbla negotiated for quit-claim deeds of property acquired by tax deeds secured by his predecessor. Because of the large number of deeds it would be extremely difficult, if not impossible, to obtain this proof.

I have examined the contract of the present tax agent. It is now specific and under it the city will secure from redemption an amount equal to the amount expended in acquiring tax deeds. This will assure the city full reimbursement for the money paid out on the present voucher to Plambla.

I am of the opinion that no reason now exists to withhold payment to Palmbla of the particular voucher in question.

Very respectfully,

GEO. L. REKER,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

DECEMBER 5, 1912.

HON. ROBERT M. SWEITZER, County Clerk.

Dear Sir:

It is the desire of the City Comptroller to make some correction on the figures presented to you in relation to the levy for the principal and interest on bonded indebtedness of the City for the current year. With that object in view, we ask on his behalf that the levy may be withdrawn before you start extending same on the books so that it may be corrected.

We have also been asked by the City Comptroller to take up with you the question of adding loss and cost to the tax rate which will be extended on behalf of the City. This rate will, unquestionably, be \$1.10, and the sums necessary to take care of bonded indebtedness will have to come out of that amount. We claim that we are entitled to a sufficient levy over and above the \$1.10, so as to produce a net \$1.10 after loss and cost have been deducted.

Without entering into an extended discussion on this point which we are ready to take up with the County Attorney as your legal representative, we will say that it is conceded to be the duty of the County Clerk to extend the rate so that the net amount realized will equal the amount of the levy. In the case of the City, the levy being reduced from the original figures by law, we maintain that the same rule applies for the reduced figures. It will not do to say that we have made allowance for loss and cost in our levy, because our levy has been reduced, and, therefore, such addition on our part has been rendered nugatory. We hope to arrive at a full understanding in regard to this matter.

We trust that you will answer in regard to both points at your earliest convenience.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

DECEMBER 6, 1912.

HON. JOHN E. TRAEGER, Comptroller.

Dear Sir:

In response to your verbal request concerning the withdrawal of certain items of the 1912 tax levy now in the hands of the county authorities for extension and subsequent collection, we beg to say that by an ordinance of May 23, 1910 (Council Proceedings, 1910-11, p. 282) it is provided that bonds not exceeding \$500,000, may be issued by the city, and that

“Said bonds and coupons shall respectfully call for and assure the payment of the sum of money herein mentioned to the bearer thereof out of the income of the water works systems of said City or income received by the City from water rates and to the credit of the Water Fund in the City Treasury; and that the fund arising therefrom, in excess of the cost of maintaining and operating said water works system be and is irrevocably pledged, for the payment of said bonds and interest coupons, and that out of the revenue of said water works system for the years 1910, 1911, 1912 and 1913, there is irrevocably pledged the sum of \$500,000 to meet such bonds at their maturity. So long as said bonds hereby authorized or any of them are unpaid, in either principal or interest, the City shall make no substantial decrease in the rates charged by it to consumers of water.

* * * * *

“The City of Chicago shall, in apt time and manner, levy and collect direct annual taxes upon all taxable property of said City sufficient to pay and discharge all that portion of the interest on said debt, evidenced by said bonds and coupons, as it falls due, and that all that portion of the principal thereof when it falls due, which is not paid out of said Water Fund and due provision thereof shall be made in the annual appropriation bills, and, annually, in the ordinances for the levy and collection of taxes.”

Under the above ordinance provisions, I am of the opinion that a direct annual tax should be levied, annual appropriation bill and tax levy ordinance passed for the discharge and payment of the interest and principal of such bonds only in the event that said interest and principal is not paid out of the water fund. The primary security for the bonds is the income of the water fund, and while that fund is suffi-

cient to discharge the principal and interest, I am of the opinion that an annual tax levy, with its attendant ordinances, is unnecessary.

I am advised in this case by your department that such fund is sufficient to take care of the obligations of principals and interest, either out of the fund already accumulated and on hand, or through the earnings of the water system. It is the purpose of the statute relating to tax levied and the ordinances passed in pursuance thereof that the needs of the city outside of and beyond those which can be met by miscellaneous receipts shall be provided for by direct annual tax and that a levy therefor should be made annually. This particular obligation of principal and interest does not require to be met by direct taxation as the water fund and its earnings are able to do this. It would, therefore, seem entirely superfluous to levy an unnecessary tax, and consequently the direction to the county authorities to levy the tax for this bond issue may be withdrawn by the city upon notice to such county authorities.

I enclose herewith a form of request which may be used in notifying the county authorities of the desire of the city to withdraw this item for its tax levy.

Yours respectfully,

JOHN W. BECKWITH,

First Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

DECEMBER 7, 1912.

HON. EUGENE BLOCK, Chairman Committee on Local Transportation.

Dear Sir:

Replying to the communication of H. H. Evans, Secretary, dated November 27, 1912, addressed to the Corporation Counsel, asking for advice as to whether your committee should call up for passage the ordinance providing for the extension of the lines of the Chicago City Railway Company on Robey street between 47th and 69th streets, we beg to submit the following:

This extension is to constitute part of the compulsory extensions under the compulsory extension clause of the traction ordinances. We assume that a sufficiency of frontage consents covering this extension is on file. The difficulty arises because of the fact that the West one half of Robey street between 59th and 61st streets is not opened; and the extension being a compulsory extension, your committee fears to call the ordinance up for passage if there is any danger of its being unenforceable, for the reason that the company will take advantage of any technicalities that may operate to put the validity of the ordinance in question.

Our investigation discloses the fact that Robey street between 59th and 61st streets have been used by the public for traffic for a great number of years; that a sewer main, 10 feet in width, lies in the middle of this stretch. Besides, there are water mains lying in the unopened half herein referred to.

Section 1 of Chapter 121 of Hurd's Revised Statutes of 1908, page 1830, provides:

"That all roads in this State which have been . . . used by the public as a highway for fifteen years and which have not been vacated in pursuance of law, are hereby declared to be public highways."

The courts have held, however, that mere travel by the public over unenclosed lands does not establish a highway by prescription, since such use is presumed to be permissive and not adverse.

O'Connell v. C. T. R. R. Co., 184 Ill. 308.

In this last case the court says:

"It must appear that the user is under a claim of right in the public, and not by mere acquiescence on the part of the owner. Express notice is not necessary, but there must be such conduct on the part of the public authorities as to reasonably inform the owner that the highway is used under a claim of right."

In view of the fact that the West one half has been used for an uninterrupted period of time for public travel and in view of the other fact that public improvements have been made in this unopened half, it is our opinion that for all intents and purposes the West half herein referred to is a public highway and that the Chicago City Railway Company cannot set up the fact of its not having been legally dedicated,

as an excuse for its refusal to construct the extension of South Robey street between 47th and 69th streets.

Furthermore it is pointed out that even if the unopened half is not a highway upon which the traction company can lawfully lay its rails, this should not prevent the passage of the ordinance in question.

The ordinance of February 11, 1907, to the Chicago City Railways Company (Council Proceedings, p. 3116) expressly provides that:

“The exact location of tracks in the streets shall be subject to the approval of the Commissioner of Public Works.”

If objection is made by the traction company that it cannot legally occupy the West half of Robey street between 59th and 61st streets, the Commissioner of Public Works can designate that both tracks on Robey street between 59th and 61st streets be laid upon the East one half.

We have ascertained the fact that this is not a physical impossibility.

Rather than to do this we assume that the traction company will either waive its objection as to the unopened condition of the street or else facilitate the condemnation proceedings already instituted by Alderman Janovsky, rather than be in default with respect to its ordinance obligations.

It is our opinion that this ordinance may be called up for passage at any time, assuming that all other legal requirements have been complied with.

Yours truly,

MAX M. KORSHAK,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

DECEMBER 9, 1912.

MR. CHARLES B. PAVLICEK, Attorney for West Chicago Park Commissioners, 604 Reaper Block, Chicago.

Dear Sir:

Concerning the payment by the West Park Board to the city of the sum of \$100,000 by virtue of section 271b of

the Revised Statutes of 1911, we beg leave to make the following suggestions for your consideration :

I. A MUNICIPALITY HAS INHERENT POWER TO MAKE CONTRACTS FOR THE IMPROVEMENT OF ITS PROPERTY AND IT MAY MAKE SUCH CONTRACTS EITHER WITH A PRIVATE INDIVIDUAL, PRIVATE CORPORATION OR WITH A STATE OR ANOTHER MUNICIPALITY.

Galena v. Corwith, 48 Ill. 423.

Smith v. Peoria County, 59 Ill. 412.

Bissell et al. v. City of Kankakee, 64 Ill. 249.

Burr et al. v. City of Carbondale, 76 Ill. 455.

Com's of Highways v. Newell et al., 80 Ill. 587.

Fahs et al. v. Darling et al., 82 Ill. 142.

Village of Hyde Park v. Ingalls, et al., 87 Ill. 13.

Richardson et al. v. Akin, 87 Ill. 138.

Indianapolis v. Indianapolis Gas, Light etc., 66 Ind. 396.

Wyandott v. Zeitz, 21 Kans. 649.

Prather v. New Orleans, 24 La. Ann. 41.

Seibrecht v. New Orleans, 12 La. Ann. 496.

Rae v. Flint, 51 Mich. 526.

Douglas v. Virginia City, 5 Nev. 147.

Ketcham v. Buffalo, 14 N. Y. 356.

Pullman v. Barber, 54 N. Y. 169.

Straus v. Eagle Ins. Co., 5 Ohio State 59.

Portland, etc., v. East Portland, 18 Ore. 21.

Portland Lumbering & Mfg. Co. v. City of East Portland, 6 L. R. A. 290.

Williamsport v. Commonwealth, 84 Pa. State 487.

East Tennessee Univ. v. Knoxville, 6 Baxter 166.

Royalton v. Royalton Turnpike Co., 14 Vt. 311.

Jones v. Richmond, 18 Gratt 517.

Miller v. Milwaukee, 14 Wis. 642.

Philadelphia v. Fox, 64 Pa. State 169.

Nashville v. Ray, 19 Wallace 468.

Louisville v. Louisville Univ., 15 B. Monroe 642.

II. THE PAVEMENT OF A STREET ON WHICH PROPERTY ABUTS IS AN IMPROVEMENT UPON AND BENEFIT TO SUCH ABUTTING PROPERTY.

In *Job v. City of Alton*, 189 Ill. 256, the Court at page 262 said:

“* * * It is one thing for the legislature to prescribe it as a *general* rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public; it is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot or a fixed sum representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is made or is about to be made, that the sum so fixed is in excess of the benefits received.”

In *Greeley et al. v. The People*, 60 Ill. 19, the court said at page 21:

“It is further claimed, that the provisions in the charter authorizing special assessments, are void, because they do not require such assessments to be made upon the principle of an equation between benefits and burdens. But, nevertheless, the general grant of power was valid. It was not necessary to prescribe the precise mode of its exercise. When the town desired to avail itself of this power, it would, of course, be necessary to exercise it in the manner required by the constitution, and not impose an assessment in excess of special benefits, nor distribute the assessment in unequal proportions over the property benefited. *Larned v. City of Chicago*, 34 Ill. 203.”

In *Norwood v. Baker*, 172 U. S. Rep. 269, the Court at page 278 said:

“But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property. As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. But the guaranties for the

protection of private property would be seriously impaired, if it were established as a rule of constitutional law, that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country. It is one thing for the legislature to prescribe it as a *general* rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement, and without any right in the property owner to show, when as assessment of that kind is made or is about to be made, that the sum so fixed is in excess of the benefits received.

In our judgment, the exaction from the owner of private property of the cost of a public improvement is substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation. We say 'substantial excess', because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment."

In this connection see also:

C., M. & St. P. Ry. Co. v. Janesville, 28 L. R. A. N. S. 1162.

Dillon on Municipal Corporations, 5th Ed., Sec. 1439.

We think, therefore, that independently of the statute the West Park Commissioners had authority to contract with the City of Chicago for the improvement of property owned by said commissioners and that the paving of a street on which said property abuts is an improvement of the property.

III. THE FACT THAT THE PLACE AT WHICH THE WORK IN QUESTION WAS BEING DONE LAY OUTSIDE THE JURISDICTION OF THE PARK BOARD IS NOT MATERIAL IF THE PARK PROPERTY GETS THE BENEFIT OF THE WORK AND IS IMPROVED THEREBY.

Speaking concerning this subject, the Court in *Maywood Co. et al. v. Village of Maywood*, 140 Ill. 216, at page 220, says:

“The general doctrine that a municipal corporation can only exercise its powers within its corporate limits is conceded. The rule is founded on the fact that, generally, no authority is given by their charters to act beyond such limits, and hence corporate authorities are restricted in that regard, as in all other attempts to exercise corporate authority, by the general rule that they can exercise only such powers as are granted by express words. This general rule has, however, the qualification that such authorities may also do those things which are ‘necessarily or fairly implied in or incident to the powers expressly granted.’ We have already decided that a village may lawfully extend its sewers beyond its limits for the purpose of securing a suitable outlet for the same.”

In speaking concerning the same subject the court in *Shreve et al. v. Town of Cicero*, 129 Ill. 226, at page 229, says:

“We now come to the third objection,—that a part of the money raised by the assessment was to be expended in another town. The ordinance providing for the improvement was passed on the first day of May, 1887. It provided for a pipe sewer on Austin avenue, from Chicago avenue to the south line of Madison street, and a wooden sewer from the south line of Madison street to the north line of Thirty-ninth street, thence east along the north line of Thirty-ninth street a distance of 1400 feet. On the 16th day of June, 1888, long after the assessment had been levied, the board of trustees of the town of Cicero, for the purpose of getting a better outlet for the sewer, made a change in the route, and in lieu of running 1400 feet from Austin avenue east on Thirty-ninth street, the sewer was extended directly south from Thirty-ninth street, in the town of Lyons, on a line with Austin avenue, about 1600 feet, to Mud Lake.

“It may be conceded that the property in the town of Cicero could not be assessed for the purpose of mak-

ing a local improvement in the town of Lyons, as held in *Hundley v. Commissioners*, 67 Ill. 561. But that doctrine has no application in this case. Here the location of the improvement, its nature and character, were settled by an ordinance, and the entire line of the sewer was in the town of Cicero. The assessment was made under this ordinance, no part of the improvement being in another town. Moreover, the extension of the sewer south, in the town of Lyons, from Thirty-ninth street to Mud Lake, can not be regarded as a local improvement in another town. Suppose no outlet could be found without extending the sewer a short distance into the territory of another town, we think the town authorities would be authorized, in such a case, to do so, without a violation of the rule announced in the case cited."

IV. WHERE A MUNICIPAL CORPORATION MAKES A CONTRACT WHICH IS NOT PROHIBITED BY LAW AND THEREAFTER RECEIVES THE BENEFITS OF SAID CONTRACT IT WILL NOT BE PERMITTED, WHEN SUED ON SAID CONTRACT, TO ASSERT THAT IT WAS WITHOUT AUTHORITY TO MAKE THE CONTRACT.

In this case it must be conceded that the park board had authority to improve its property, but the method that it adopted to make the improvement is questioned. It seems that what was said by the Supreme Court in *Chicago v. P., C., C. & St. L. Ry. Co.*, 244 Ill. 220, at page 232, is therefore applicable to the matter now under consideration. The court there says:

"If a city may lawfully exercise a power, it may be equitably estopped to question the validity of its exercise on account of the manner in which it is done or the lack of required formalities, as right and justice may require. (*Chicago and Northwestern Railway Co. v. People*, 91 Ill. 251; *City of Chicago v. Carpenter*, 201 *id.* 402; *People v. Blocki*, 203 *id.* 363; *Village of Winnetka v. Chicago and Milwaukee Electric Railway Co.*, 204 *id.* 297; *Village of London Mills v. White*, 208 *id.* 289.)"

In *Martel v. City of East St. Louis*, 94 Ill. 67, the court said at page 69:

"* * * It would be unconscionable to permit the city to recover a penalty from defendant for pursuing a trade or calling, when, for the privilege of carrying it on, the city has received and retains the consideration exacted of him. It is of no consequence whether the ordi-

nance under which the privilege was granted was valid or invalid, or whether the agents acting on behalf of the city were *de facto* or *de jure* officers, or no officers at all.”

In *East St. Louis v. East St. L. G. L. & C. Co.*, 98 Ill. 415, the Court said at page 423:

“The defense is placed solely upon the ground that the city had no power to make the contract.”

And continuing on page 426:

“* * * So far as the contract has been performed, by furnishing light to the city without its disaffirmance of the contract, it may be treated as if it had been a single contract for the furnishing of the light for the months in question alone, and one fully completed. The gas light having been furnished and enjoyed by the city without objection, it should pay for it.”

* * * * *

“The general rule applying in such case is thus stated in 2 Parsons on Contracts, 790: ‘A general rule has been asserted, which certainly rests upon reason and justice. It is, that where a party has accepted and made his own the benefit of a contract, he has estopped himself from denying in the courts the validity of the instrument by which those benefits came to him.’”

* * * * *

“In *Hitchcock v. Galveston*, 96 U. S. 341, the city council of Galveston had contracted with Hitchcock and others for the construction of certain sidewalks, to be paid for by the issue of city bonds. After the work was partly performed, the city council stopped the work and prevented its completion. The action was for this breach of the contract. It was objected that by reason of the supposed want of power to issue the bonds, the entire contract was void, and no action could be maintained for the breach thereof. The Supreme Court of the United States held that the city was liable to the extent of the work actually performed under the contract, even though it had no lawful authority to issue the bonds, and in discussing the subject said: ‘It is enough for them (plaintiffs) that the city council have power to enter into a contract for the improvement of the sidewalk; that such a contract was made with them; that under it they have proceeded to furnish materials and do work, as well as to assume liabilities; that the city has received and now enjoys the benefit of what they have done and furnished; that for these things the city promised to pay; and that after having received the benefits

of the contract the city has broken it. It matters not that the promise was to pay in a manner not authorized by law. If payments can not be made in bonds because their issue is *ultra vires*, it would be sanctioning rank injustice to hold that payment need not be made at all." * * *

In *Peter Wilkins v. The Mayor, etc., of New York, et al.*, 9 Misc. Rep. (N. Y.) 610, the Court held:

"A plea of *ultra vires* is not available against an agreement entered into by a municipal corporation where the other party to such agreement has made valuable improvements to the property in question, relying upon such agreement.

"An agreement with the lessee of a ferry franchise that if it becomes its own successor on a resale of the franchise improvements made by it shall become the property of the city without payment therefor, and that the terms of sale on such resale shall contain a provision that if the purchaser and lessee should be a person or persons other than the first lessee such person or persons should pay to such lessee the value of the improvements, is one within the discretion of the commissioners of the sinking fund, and a sale in pursuance of such terms will not produce waste of the municipal property."

In *Village of Harvey v. Wilson*, 78 Ill. App. 544, the court said at page 549:

"* * * The village has had the benefit of these services, knew all about appellees' employment and the extent and nature of their services while they were being rendered, and notwithstanding, a new board of trustees say to appellees: True, you rendered these services, they are worth what you claim, we have had the benefit of them in the vindication of the very existence of the village of Harvey in the adjudication of the court of the highest resort in the State, but we had a village attorney who should have done this work; we have no record that you were ever employed, or that we authorized or ratified your employment; we have made no appropriation to pay you, and we will not pay.

"Such a position is most unconscionable and should not receive the sanction of any court, unless to do so is to obey some positive behest of the law, which fortunately for the maintenance of fair dealing and good morals is not the case."

In *George F. Blake Mfg. Co. v. Sanitary Dist. of Chicago*, 77 Ill. App. 287, the Court said at page 293:

“* * * There is no evidence that appellant had any knowledge or notice that there was any limitation of expense in the order of the board of trustees directing the test, and even if appellant had had such knowledge, it could not have prevented the incurring by appellee of expense in excess of the limitation. It appears from the evidence that the bills, exclusive of appellant's bill, amounting in all to \$1,496.30, were paid by warrants, which must have been issued by the proper officer or officers of the board of trustees, after approval of the bills by the board. The defense is wholly inequitable, and should not prevail unless there is some inexorable, unyielding rule of law to prevent a recovery by appellant. We are, happily, ignorant of any such rule.

“Mr. Rudolph was the agent and executive officer of appellee in making the test, and he having retained, for the purpose of the test, appellant's pumps and employe, and appellee having had the full benefit thereof, it is estopped to set up in defense of appellant's claim the want of power of its agent in the premises, *County of Cook v. Harms*, 108 Ill. 151, 164, and cases cited.”

V. THE SECTION IN QUESTION IS UNQUESTIONABLY REMEDIAL AND SHOULD THEREFORE UNDOUBTEDLY BE CONSTRUED TO EFFECTUATE THE REMEDY CONTEMPLATED, IF POSSIBLE.

It seems as if some question had arisen as to whether or not the park board had authority to make the contracts that it entered into with the city prior to the passage of section 270 of chapter 105.

The legislature therefore sought to do two things at the same time, to make certain the park board's authority to make contracts of the nature now under consideration and to impose a liability on the contracts theretofore made to the extent of \$100,000 independently of the existence of statutory authority to make them. The rule to be followed in construing such statute is stated in *Conkling v. Ridgely & Co.*, 112 Ill. 36, wherein the court at page 43 says:

“The statute in question is a remedial one, and a point to be considered in the construction of all remedial statutes, is, the old law, the mischief, and the remedy; and it is the business of the judges so to construe the act as to suppress the mischief and advance the remedy. (1 Blackstone's Com. 87.) As was said in *Railroad Co. v.*

Dunn, 52 Ill. 260: 'The rule in construing a remedial statute, though it may be in derogation of the common law, is, that everything is to be done in advancement of the remedy that can be done consistently with any fair construction that can be put upon it.'

And in treating of this same subject the court in *Bree et al. v. Bree, Admr. etc.*, 51 Ill. 367, at page 371:

* * * "The act of 1857 does not, in terms, require that the petition shall show that an account has been made and returned to the county court, but it authorizes the administrator to file a petition when he ascertains that the personal estate is not sufficient to pay the debts, and shall have filed such an account. It is, no doubt, under this provision, necessary to allege that the account has been made, or that there were no personal effects of which an account could be made.

"In this case it was alleged in the petition that decedent left no personal property, and on the proofs in the case the court below, in its decree, found the allegation to be true. It was the evident purpose of the legislature to provide the means of subjecting the real estate of decedents to the payment of their debts; and not simply in a class of cases only, but in all cases. And the want of such power in administrators and executors, was the evil they were engaged in remedying; and the law must be so construed as to effectuate, and not destroy or cripple the remedy. To hold that this averment is essential in all cases to the jurisdiction of the court, and its proof to the granting the relief, would be to deny the power of the court to order a sale of real estate where decedent owned real estate and owed debts, but died without personal property. This could not have been the intention of the general assembly. They no doubt intended to, and supposed they did, provide for subjecting the real estate of deceased persons to the payment of their debts, when their personal property was insufficient, and the same necessity exists where there is no personal estate at the time of his death, as arises when it has been exhausted in the due course of administration. It sufficed, therefore, to give the court jurisdiction, to allege that intestate died leaving no personal property."

The section in question constitutes part of the West Park Board's charter and the language there employed should be construed as mandatory rather than permissive.

In *Snell v. City of Chicago*, 133 Ill. 413, the Court says:

“Words of permission in the charter of a corporation if tending to promote the public benefit are obligatory. And it is promotive of the public good that a plank road corporation, organized under special acts, shall not enjoy any greater privileges than other like corporations formed under a general law, and when the law says such special corporation ‘may enjoy’ the same privileges as those awarded under the general law, it will be construed to mean ‘shall enjoy’ the same privileges.

You note that the language of section 271b is that this \$100,000, or so much thereof as may be necessary, be paid.

“* * * for the purpose of discharging any valid existing indebtedness of such park commissioners arising from any agreement or agreements made by such commissioners with such city, town or village prior to the adoption of this act for the improvement and repair of any such public street, avenue or alley.”

It will therefore be observed that the \$100,000 is to be paid on account of any agreement or agreements made. It will be noted that there are no words qualifying agreement or agreements, and it is a proposition that does not admit of dispute that a valid indebtedness may have for its foundation an agreement that is valid or an agreement that is voidable.

We believe that the agreements in question are valid for the reasons hereinbefore indicated even as executory contracts, but independently of that question, under other authorities heretofore cited, it seems clear that as executed contracts they are binding on the West Park Board.

But there is an additional reason why there is a valid existing indebtedness due from the park board to the city. The city has levied special assessments upon park property covering much of the indebtedness in question. While it may be conceded that if the park board had appeared and contested the right of the city to obtain judgments against the park property for special assessments that the city would have failed in its effort to obtain judgments, but the fact remains that the Court had jurisdiction to hear and determine the right of the city to have judgments against the park property and it did determine that the city should have judgments and entered judgments accordingly. However erroneous these judgments may be they are not void and so long as they

are not reversed on appeal they are valid subsisting liabilities on the part of the park board to the city.

We must take one or the other of two views concerning these contracts made prior to July 1, 1907; they are either valid or invalid.

If said contracts are to be regarded as valid the enactment of section 271b is wholly unnecessary unless it should be concluded that the sole purpose of its enactment was as a part of section 271 so that it might be said that the object of the legislature in passing 271 and 271b was to give authority to the park board to issue bonds to the extent of \$500,000 and to expend \$400,000 thereof on future contracts for public improvements and \$100,000 thereof on contracts theretofore made for public improvements.

If we are to adopt the view that it was the intention of the legislature, by section 271b, that the city could not pay out any money on account of the bonds in question except upon valid contracts theretofore made and that theretofore the park board had no authority to make such contracts and that it was not the intention of the legislature to validate the contracts theretofore made to the extent of \$100,000, then we are forced to the conclusion that the wisdom of the legislators led them to intentionally do a wholly useless thing to enact a section that was absolutely meaningless, one which they contemplated would have no force or effect.

Courts are not inclined to ascribe such motives to legislatures, but as heretofore suggested in the cases cited in 112 and 151 Illinois, there are two constructions which might be given to remedial statutes; that which will effectuate the remedy sought to be given shall be followed. And this even on the theory that the park board made agreements prior to July 1, 1907, which were not valid by reason of lack of authority, section 271b should be construed as a remedial act as validating contracts heretofore made to the extent of \$100,000.

We believe that in view of the objections heretofore made, and for additional objections which might be made but which the lack of time forbids, that it is not only permissible for the West Park Board to pay to the City of Chicago the proceeds

of sale of the bonds referred to in the statute, but it is the duty of said board to make said payment.

Yours respectfully,

CHAS. M. HAFT,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

DECEMBER 13, 1912.

HON. JOHN A. RICHERT, Chairman Committee on Finance.

Dear Sir:

You request the opinion of this department as to the form of an ordinance repealing a certain ordinance granting rights to the P. C. C. & St. L. Railway Company for certain switch tracks, and also as to the right of the city to rebate compensation.

In view of what is hereinbelow said concerning the refunding of compensation to this Company, I will say that the same principles of fair dealing, to which I later call attention, apply to the passage of any ordinance relieving this corporation of any liability, and, therefore, I am of the opinion that no ordinance should be passed cancelling the bond in question.

As to the right of the city to rebate compensation, the compensation heretofore paid is in the nature of a license fee, and with respect to a rebate on such fee, section 1516 of the Chicago Code of 1911 provides in part that—

“In no event shall any rebate or refund be made of any license fee or part thereof * * * or by reason of non-user of such license * * *”

The amount of compensation paid by the Railway Company was paid voluntarily, under no duress, nor under any mistake of fact. Under these conditions, the money is not recoverable. In addition, Section 1518 of Chapter XLI provides that:

“Hereafter no license or permit shall be issued to any person, firm or corporation unless and until such person, firm or corporation discharges and pays to the City of Chicago all indebtedness then due from such person, firm or corporation.”

The P. C. C. & St. L. Railway Company is a part of, controlled and operated by the Pennsylvania Company as one of the "Pennsylvania Lines." The Pennsylvania Company and its constituent corporations have been for many years in debt to the City of Chicago. There is a present obligation upon the Pennsylvania Company of \$5,000.00 due the City of Chicago. From the language of section 1518 above quoted, it was plainly the intention of the City Council that no original license should be granted to any company thus indebted to the city. It would seem to be only in conformity with the spirit of the ordinance and in harmony with procedure dictated by fairness and good morals that the Pennsylvania Company discharge its indebtedness to the city before asking at the city's hands and rebate privileges or favors of any character. It is with poor grace that the P. C. C. & St. L. Railway Company, which is practically owned, dominated and operated by the Pennsylvania Lines asks favors from the municipality while at the same time the corporation by which it is dominated is indebted to the city.

I am of the opinion that the refund requested should be denied and as hereinbefore said, that no action be taken relieving the corporation from any liability under the bond.

Yours respectfully,

JOHN W. BECKWITH,
Acting Corporation Counsel.

DECEMBER 14, 1912.

To the Honorable, the City Council, of the City of Chicago.

Gentlemen:

Under an order passed by your honorable body on December 9, 1912, the Corporation Counsel was directed to make a report to you concerning the validity of the ordinance recently passed increasing the salary of the Chief Justice of the Municipal Court.

The ordinance in question was passed by the City Council on November 29, 1912, and was approved by the Mayor on November 30, 1912. It went into effect immediately upon approval. The re-elected chief justice did not enter upon his second term until December 2, 1912. The ordinance was therefore passed and took effect before the beginning of the term

for which the chief justice was elected, but after his election. We have already advised you in an opinion submitted on December 9, 1912, that it was within the power of the City Council to pass an ordinance of this character and that same would be effective without a referendum.

We apprehend that the precise question on which you now desire information is whether it is lawful to so increase the salary of the chief justice between the time of his election and the time he assumes the duties of his office in the face of the provision of the statute that his salary shall not be increased during the term for which he shall have been elected. The wording of the statute on this point is as follows:

“The salaries of the chief justice and associate judges shall be fixed by the city council: *Provided, however,* that the salary of the chief justice shall not be less than seven thousand five hundred dollars (\$7,500) per annum and that the salary of an associate judge shall not be less than six thousand dollars (\$6,000) per annum, and that the salary of no judge shall exceed the salary and compensation fixed, from time to time, by law for a judge of the circuit court of Cook County, and that the salary of no judge shall be increased or diminished during the term for which he shall have been elected.”

Section 11 of Article IX of the Constitution of the State also bears on the question to the extent that it may be found applicable. This says:

“The fees, salary or compensation of no municipal officer who is elected or appointed for a definite term of office, shall be increased or diminished during such term.”

It will be seen from the above that no ordinance which provides for an increase of salary for a term or part of a term that has begun would be valid. On the other hand, an ordinance passed during the term merely fixing the salary of an office and not stating when it shall become operative, while it does not take effect so as to change the salary of the incumbent, is actually in force, and becomes effective when his successor takes office, and is valid as to such successor.

Roodhouse v. Johnson, 57 Ill. App. 73.

The wording of both the statute and the Constitutional inhibition is such that it may be said at the outset that there is no restriction on the City Council's power to increase or di-

minish the compensation of an officer if it is done before the term begins. This is emphasized by the fact that in many jurisdictions the wording covers such a situation. Thus, in Pennsylvania and Kentucky the constitution prohibits an increase or decrease "after his election or appointment", in California "after his election or during his term of office." Other states have similar provisions showing a clear intention to prohibit a change after election as well as during the term.

Applying the rule that "the exact meaning of such a limitation depends on the words used" (29 Cyc. 1428) to our statute, we find that the City Council's power to increase or diminish this salary after election but before the beginning of the term is not restricted.

While, therefore, it is improper to make such a change where the constitution or statute prohibits it "after the election" of an officer, in case the change is only forbidden "during the term" such an increase may be made before the officer qualifies.

Dillon on Mun. Corp., Fifth Ed., Sec. 424n.

Wesch v. Com. Counc. of Detroit, 107 Mich. 149.

Rice v. National City, 132 Cal. 354.

Stone v. Mayo, 21 Ky. Law Rep. 1559.

Aside from the fact that the authority to raise or lower a salary after election but before the beginning of the term is not taken away from the City Council, its action can be sustained on another and entirely different ground, which would make it valid even if the above reasons were not sufficient. This is the fact that the statute authorizes the City Council to fix the salary, and the same was not fixed until this ordinance was passed. The mere appropriation of the smallest amount permitted to pay a salary which the statute says must not be less than a certain amount but may be fixed at more, does not amount to fixing the salary. (*U. S. v. Langston*, 118 U. S. 389).

Where there is a failure to fix the salary as required by law, it may be fixed by the proper body after election, and some authorities even hold that it may be done after the qualification of the officer.

Stone v. Pryor, 20 Ky. L. Rep. 312.

Marion Co. Fiscal Ct. v. Kelly, 22 Ky. L. Rep. 174.

Merwin v. Boulder Co., 29 Colo. 169.

Perling v. Co. of York, 113 Pa. 108.

“Where the county board has not fixed the compensation of the county clerk before his election, the power to do so remains, and they may fix it after his election and it will not be a violation of the constitutional provision prohibiting the increasing or diminishing of his compensation during his term of office, because, until fixed by the board, he has no compensation to be either increased or diminished.”

Purcell v. Parks, 82 Ill. 346.

It is obvious, therefore, that the ordinance in question is valid, and that it became effective in time to fix the salary of the present incumbent.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

DECEMBER 16, 1912:

HON. ELLIS GEIGER, Chairman Committee on Schools, Fire, Police and Civil Service.

Dear Sir:

Pursuant to your request, we have examined an ordinance creating a department of police and repealing certain sections of The Chicago Code of 1911, published on pages 2425 to 2430 of the Council Proceedings of November 25, 1912, with a view of passing upon its validity.

The first question which naturally arises is whether the City Council of the City of Chicago has the power to establish a department of police, to create offices and positions therein, to provide for the manner in which the officers and employes of the department shall be appointed, to define the duties of these officers and employes and to regulate their conduct.

Municipal corporations are primarily organized by law as an agency of the State to assist in the civil government of

the territory incorporated. They derive all their powers from the State and can have no greater powers than those expressly or impliedly delegated to them by the State Legislature.

Section 1, Article 5, of the Cities and Villages Act of the State of Illinois is in part as follows:

“Section 1. The city council in cities, and the president and the board of trustees in villages, shall have the following powers:

* * *

Sixty-sixth. To regulate the police of the city or village, and pass and enforce all necessary police ordinances.

* * *

Sixty-eighth. To prescribe the duties and powers of a superintendent of police, policemen and watchmen.”

Sections 2 and 3 of Article 6 of the Cities and Villages Act are as follows:

“Section 2. The city council may, in its discretion, from time to time, by ordinance passed by a vote of two-thirds of all the aldermen elected, provide for the election by the legal voters of the city, or the appointment by the mayor, with the approval of the city council, of a city collector, a city marshal, a city superintendent of streets, a corporation counsel, a city comptroller, or any or either of them, and such other officers as may by said council be deemed necessary or expedient. The city council may, by a like vote, by ordinance or resolution, to take effect at the end of the then fiscal year, discontinue any office so created, and devolve the duties thereof on any other city officer; and no officer filling any such office so discontinued, shall have any claim against the city on account of his salary, after such discontinuance. The city marshal shall perform such duties as shall be prescribed by the city council for the preservation of the public peace, and the observance and enforcement of the ordinances and laws; he shall possess the power and authority of a constable at common law, and under the statutes of this state.

Section 3. All officers of any city, except where herein otherwise provided, shall be appointed by the mayor (and vacancies in all offices except the mayor and aldermen shall be filled by like appointment) by and with the advice and consent of the city council. The city council may, by ordinance not inconsistent with the provisions of this act, prescribe the duties and define the powers of all such officers, together with the term of any such office: *Provided*, the term shall not exceed two years.”

Since the enactment of the last two sections of the statute hereinabove quoted which was in 1872, the Civil Service Act was passed (1905) whereby all officers, as well as employes, classified by the Civil Service Commission under that act, must be appointed from a list of eligibles certified by the Civil Service Commission after due examination as provided by the Civil Service Act and by the rules and regulations of the Civil Service Commission.

It will be seen from the foregoing that the City Council has the broadest possible authority to establish a department of police, to create offices and positions therein, to prescribe the duties of the officers and employes of the department and to regulate their conduct. The City Council has the further power of providing for the appointment of all officers and employes of the department in accordance with the Civil Service Act and the rules and regulations of the Civil Service Commission.

The scheme of the ordinance is primarily to create a police force composed of policemen under the supervision and direction of the superintendent of police who is made the executive officer of the entire department. This police force is organized for the purpose of preserving peace and securing good order and cleanliness within the City of Chicago. Besides those duties prescribed by the ordinance, the statutes of the State of Illinois impose upon policemen certain powers and obligations and extend to them benefits which are not applicable to any other member of the Police Department as constituted by the ordinance.

By virtue of section 12 of Article 6 of the Cities and Villages Act, policemen are made conservators of the peace and are given the power to arrest or cause to be arrested with or without process all persons who break the peace or violate any ordinance of the city or village or any criminal law of the State.

By virtue of section 2, division 6, of the Criminal Code of the State of Illinois, it is made the duty of policemen to arrest any person committing a criminal offense or breach of the peace in his presence and to suppress all riots and unlawful assemblies and to keep the peace.

By virtue of section 83 of the Criminal Code of the State of Illinois, every policeman who willfully and corruptly refuses to arrest or confine any person charged with or convicted of any offense or willfully and corruptly omits or delays to execute any process to him directed whereby the offender escapes may be confined in the county jail or fined not exceeding \$1,000 or both, and may be removed from his office.

By virtue of the Police Pension Act, policemen are entitled to be retired on pensions after twenty-two years of service or upon becoming disabled while in the service and their widows and minor children are entitled to pensions.

None of the aforementioned powers, duties, obligations and benefits are extended by any provision in the statutes to any person who is not a policeman.

A careful examination of the provisions of the proposed ordinance will disclose that it was framed in view of the clearly defined distinction between policemen and those who are not policemen. In a city like Chicago with its great population and its intricate governmental machinery, the necessity of extending the functions of the Police Department which incidentally arise in the preservation of peace and good order within its limits is very apparent. These incidental duties do not necessarily require the performance of such police powers as are enumerated in the statutes and yet they are so closely related to the performance of such duties that they must necessarily be performed under the supervision of the superintendent of police.

Under the ordinance the Police Department is divided into two bureaus at the head of each of which is one deputy superintendent. The first deputy superintendent is placed in immediate control over the active bureau; the second deputy superintendent is in charge of the clerical, mechanical and inspection bureau.

In the active bureau is placed the nucleus of the Police Department, the police force, composed of policemen charged by law with the duty of suppressing crime. None but the members of the police force are given the power to make arrests.

The lines of duties imposed by the ordinance upon all of

the members of the department who are not policemen are clearly distinguishable from what are commonly known as police duties. They are concerned with the business management of the department, the clerical work thereof, the care and custody of its properties, the instruction of the police force and the investigation and inspection of the police force in the performance of their duties and in the maintenance of their stations and equipment.

There remains only to be considered the question whether the manner of appointment of some of the members of the department is contrary to law.

An objection has been raised to the ordinance because it provides that the second deputy superintendent of police shall not be a member of the police force. It is urged that inasmuch as the second deputy superintendent of police is equal in rank to that of the first deputy superintendent and higher in rank to other officers who are members of the police force of the City of Chicago, those in the next lower Civil Service grade or rank to that of the second deputy superintendent of police are entitled to compete in an examination to be held for the filling of the office of the second deputy superintendent of police, whereas, under the ordinance, members of the police force who, it is claimed are next lower in rank are barred from the position of second deputy superintendent.

The objectors to this feature of the ordinance gravely misconstrue the Civil Service law applicable to this case. While the second deputy superintendent and the first deputy superintendent are equal in rank, the difference in their duties are such as to necessitate their classification in different kinds of service. Thus the Civil Service Commission may classify the first deputy superintendent of police in the police service of the City of Chicago while they may classify the second deputy superintendent of police in the clerical service or the supervising service as the case may be and hence that position is not one to which any member of the police force may be promoted.

We have critically examined the proposed ordinance and the amendments thereof hereto attached and which we have

drafted and are of the opinion that the ordinance, with such amendments, is clear, unambiguous and valid in law.

Respectfully submitted,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

DECEMBER 17, 1912.

HON. JAMES DONAHOE, Chairman Committee on Judiciary,
State Legislation, Elections and Rules.

Dear Sir:

In compliance with the resolution adopted by the City Council on September 30, 1912, we transmit herewith a draft of a bill, which in our opinion remedies the Harbor Act of June 10, 1911.

In drafting the proposed bill we have used as the basis thereof said act of June 10, 1911. The changes, additions and omissions which we have made and which we deem necessary and desirable and our reasons therefor are as follows:

TITLE OF THE PROPOSED BILL.

The title remains substantially the same except that the word "breakwater" has been added to the list of harbor facilities included therein, and the words "recovery and acquisition of artificially made or reclaimed lands of the State" have also been added.

We insert the word "breakwaters" as a breawater is a necessary element of harbor protection. We insert said phrase referring to artificially made and reclaimed lands be it will be necessary to acquire such lands before harbor construction can begin. The original act is silent on this question.

SECTION 1 OF ACT.

This section includes at least four separate legislative subject matters, each of which should be embodied in a separate section.

SECTION 1 OF BILL.

This section grants power to cities to acquire, own, construct, maintain and operate harbors and all necessary and incidental harbor improvements and utilities. It substantially embodies the first sentence of the Act down to the phrase "appropriate terminal facilities" in the 12th line thereof except the word "breakwaters" has been inserted at the appropriate place.

SECTION 2 OF BILL.

This section defines the scope of the power to lease harbor facilities. It embraces that portion of section 1 of the Act included in lines 12 to 29 inclusive, modified, however, in the following particulars:

First: The phrase "to persons, firms or private corporations for the purpose of using the same" employed in the Act to indicate to whom portions of harbor utilities may be leased, has been omitted. We think the City Council ought to be given the broadest power of leasing the harbor utilities to such persons or corporations as it may deem proper.

Second: The phrase "not granting right of renewal nor relating to taking over of tenants' improvements, except," has been omitted. This phrase was House Amendment No. 13 to the bill as originally passed by the Senate. We omit it because it obscures the meaning and intent of the entire section and also because it restricts the leasing power of the City Council.

SECTION 3 OF THE BILL.

This section grants the power to acquire by purchase, unconditioned gift of condemnation. It takes the place of that portion of section 1 of the Act from the semi-colon (;) in the middle of line 29 to the middle of line 45. We have entirely re-written this portion of the Act.

Our reason for so doing is that the grant of power to acquire property shall be concisely and clearly stated.

The phrase "construction for a stipulated money consideration only or by day labor" has also been omitted because it is meaningless in the connection in which it is used. Excepting the word "construction" the phrase was inserted by the House of Representatives as Amendment No. 24.

SECTION 4 OF THE BILL.

This section embraces all that part of section 1 of the Act from the period (.) in the middle of line 45. We have made the following changes in this portion of the Act:

First: The words "right, power or authority" have been substituted for "right or license" so as to agree with the phrase "right, power or authority" in lines 2 and 3 of section 4 of the bill, and because it is the proper method of stating a grant of power by the State.

Second: We have omitted the words "* * * firm or private corporation, at any time, and no municipal or other public * * *" in lines 57 and 58 of the Act. This change broadens the power of the City Council and enables the city to authorize any person or corporation (private, public or municipal) to construct harbors or harbor facilities.

SECTIONS 5 AND 6 OF THE BILL.

These sections are not in the Act. They authorize cities to use such portions of artificially made and reclaimed lands, the title to which is in the State of Illinois necessary or appropriate for harbor purposes.

They further authorize cities to designate by ordinance the particular lands which are to be used or occupied for the purposes enumerated in the bill and to bring and maintain all necessary suits, actions and proceedings in its corporate name for the recovery of the possession of such lands. In view of existing conditions we consider this grant of power absolutely necessary.

SECTIONS 7 AND 8 OF THE BILL.

Section 2 of the Act has been divided into these sections. The first portion of section of the Act has been re-written and constitutes section 7. It is substantially the same as the first portion of section 2 of the Act. As re-written this section permits any person, as well as a corporation, (public, private or municipal) to construct harbor facilities on being authorized so to do by ordinance of the City Council.

The second portion of section 2 of the Act is section 8 of the bill. It is the same as the Act except that it authorizes

cities to purchase harbors and harbor utilities constructed thereunder as well as under any other law of the State.

SECTION 9 OF THE BILL.

This is section 3 of the Act re-written. The following changes have been made:

First: The words "or prescribing the location where facilities, improvements and utilities mentioned in section 1 of this act shall be constructed" in lines 4, 5 and 6 have been omitted. If this provision were retained, 5% of the voters could compel the submission of any ordinance prescribing a harbor location to the voters at a general or special election.

Second: The City Council is also authorized to call a special election for a referendum on an ordinance leasing for more than five years (if a petition for referendum thereon is filed by 5% of the voters).

SECTIONS 10 AND 11 OF THE BILL.

These sections are also new. They authorize cities to acquire from shore owners, lands, whether of natural or artificial formation, property or property rights, including riparian rights, without other compensation by agreeing on a boundary line separating the lands to be acquired by the shore owners and thereupon to file a suit in chancery in the Circuit Court for the confirmation of such boundary line.

They also authorize cities by and through such proceedings to quiet the title of such riparian owners to any lands, whether of artificial or natural formation, lying on the inner or land side of such boundary line, free from any adverse claim in any way arising out of any question as to where the shore was at any time in the past or as to the title to any existing accretions.

This power has heretofore been given to the Commissioners of Lincoln Park and the South Park Commissioners but has never been conferred on cities. We see no reason why it should be withheld from a city desirous of entering on harbor development. We have closely followed the Park Act of June 11, 1912 (Session Laws, 1912, p. 51). We have not included, however, the provision of that Act permitting any

legal voter or tax-payer to become a party defendant in the proceeding, nor the provision requiring the Attorney General to appear in the proceeding and assert the claim of the State of Illinois.

SECTION 12 OF THE BILL.

This section is a re-draft of section 4 of the Act and provides that if any city sells any artificially made, reclaimed or submerged lands which shall be acquired by it for harbor purposes such lands shall revert to the State of Illinois.

SECTION 13 OF THE BILL.

This section is new and authorizes the location of dock lines and harbor lines.

SECTION 14 OF THE BILL.

This section defines the terms "utility" and "artificially made or reclaimed lands" as used in the bill.

SECTION 15 OF THE BILL.

This section is substantially the same as section 6 of the Act.

SECTION 16 OF THE BILL.

This section provides that if any portion of the bill is invalid, it shall not affect the validity of any other portion which can be given effect without such invalid part.

SECTION 17 OF THE BILL.

This section repeals any Act conferring police control or jurisdiction upon any municipal corporation other than a city within the area or district where harbor improvements are to be constructed.

SECTION 18 OF THE BILL.

This section repeals the Harbor Act of June 10, 1911, and all acts or parts of acts in conflict with the bill.

SECTION 19 OF THE BILL.

This section contains the emergency clause giving the bill immediate effect.

OMMITTED SECTIONS OF THE ACT.

Section 5 of the Act directs the keeping of separate accounts and submitting the same once a year to the Auditor of Public Accounts of the State. This is omitted because we see no practical benefit therefrom.

Section 7 of the Act has been omitted because it is inconsistent with other provisions of the bill and the objects sought to be obtained thereby.

Section 8 of the Act is omitted because no reason occurs to us why it should be expressly stated in the bill that cities, in the construction, maintenance or operation of the public utilities mentioned in the bill, should be limited to the same rules of law as apply to private persons or corporations.

JAS. G. SKINNER,

Assistant Corporation Counsel.

BRYAN Y. CRAIG,

Assistant Corporation Counsel.

JOHN W. BECKWITH,

First Assistant Corporation Counsel.

WM. H. SEXTON,

Corporation Counsel.

DECEMBER 17, 1912.

HON. CHARLES M. THOMSON, Alderman, 25th Ward.

Dear Sir:

In your letter of recent date you presented for the consideration of this department, substantially the question:

Can an alderman resign upon February 10th to take effect upon April 1st, and if the council accepts the resignation can a primary election be called for February 25th (which is the date fixed by statute for the annual aldermanic primary), to fill the proposed vacancy?

I am unable to find the subject of prospective resignations considered by the courts of this state.

In *Pace v. People*, 50 Ill. 432, the subject of resignations

is considered. The point in this case is that a resignation once tendered can not be withdrawn. This, however, was a resignation which took effect at once.

Two questions are presented by your letter. May the resignation be withdrawn before the time set for it to take effect, and is there a vacancy created?

These questions received an exhaustive consideration in *Nevada v. Murphy*, 18 L. R. A. (N. S.) 210. Murphy tendered his resignation upon February 3, 1908, to take effect April 15th. It was addressed to the County Commissioners. It was received by them, spread upon the minutes and accepted. Upon February 29th and again upon March 30th, Murphy withdrew the resignation and requested its return. Upon April 6th, the County Commissioners denied the request to withdraw the resignation. Murphy continued to act as sheriff and the case came to the Supreme Court on a writ of quo warranto. The court said:

“But one main question is presented in this proceeding: Did respondent have the right to withdraw his resignation after it was filed with the board of county commissioners, and before the time specified in such resignation for it to become effective?

* * * * *

“By the great weight of authority, however, a prospective resignation may be withdrawn before the time prescribed for it to take effect.

* * * * *

“One of the earliest and a leading case on the question of the right of withdrawal of a prospective resignation is that of *Biddle v. Willard*, 10 Ind. 62. The court in that case said: ‘To constitute a complete and operative resignation there must be an intention to relinquish a portion of the term of the office, accompanied by the act of relinquishment. Webster and Richardson define the words ‘resign’ and ‘resignation’ substantially thus: ‘To resign is to give back, to give up, in a formal manner an office; and resignation is the act of giving up. Bouvier says resignation is the act of an officer by which he declines his office, and renounces the further right to use it. Acc. Wharton. Hence a prospective resignation may, in point of law, amount but to a notice of intention to resign at a future day, or a proposition to so resign; and for the reason that it is not accompanied by a giving up of the office; possession is still retained, and may not necessarily

be surrendered till the expiration of the legal term of the office, because the officer may recall his resignation,—may withdraw his proposition to resign. He certainly can do this at any time before it is accepted; and after it is accepted he may make the withdrawal by the consent of the authority accepting, where no new rights have intervened.' A part of the above quotation forms a portion of the text of § 417 of Mechem on Public Officers, as also of § 415 of Throop on Public Officers. Throop, in § 415, says: 'But, where the resignation is prospective, it may be withdrawn, at least, with the consent of the appointing power, and, according to some cases, without such consent, unless some new rights have intervened, such as the appointment of a successor.' "

I am therefore of the opinion, that it is doubtful whether a resignation to take effect in the future creates such a vacancy as will authorize the calling of a primary to nominate candidates for the proposed vacancy.

If you wish to leave the subject free from any uncertainty, your resignation when tendered, should be to take effect at once, and it should be accepted by the council and a special primary and election to fill the vacancy should be called by the council, to be held upon the same day as the regular primary and general election for the office of alderman. The resignation must then be carried out by the abandonment by you of the office.

The primary law provides that this primary is to be held upon the fourth Tuesday of February, and that petitions for nomination will be received thirty days before that time. This would be about January 25th.

To hold this special election upon the same footing with other elections and to give prospective candidates an opportunity to get their petitions filed, your resignation should be accepted by the council not later than January 13, 1913.

Furthermore, I am of the opinion, that signature to a primary petition to fill the vacancy would be invalid if obtained before the acceptance of the resignation.

Very respectfully,
 GEORGE L. REKER,
Assistant Corporation Counsel.

Approved:
 WM. H. SEXTON,
Corporation Counsel.

DECEMBER 18, 1912.

MR. JAMES S. MCINERNEY, Prosecuting Attorney.

Dear Sir:

We have your letters of the 12th inst., in which you tell us that prosecutions brought under sections 616 and 1425, of the Chicago Code of 1911 are being dismissed by Judge Caverly, for the reason that these sections contain no penalty for violations of same.

We note that section 616 is in the chapter entitled "Buildings" and section 1425 is in the chapter entitled "Health." These chapters are both subdivided into a number of Articles, and, as a general rule, when an Article contains prohibitions, there is at the end of such Article a provision for a penalty.

Section 616 is in Article XII of the chapter entitled Buildings. There is no special provision at the end of this Article regarding penalties, but at the end of Article XXVI there is a general provision providing a penalty for the violation of any of the provisions "of this chapter, where no other penalty is provided." This general provision for a penalty was at the end of the chapter as it originally stood, but Article XXVII, regarding places of amusement has since been added.

We do not, however, think that this would make any difference or would prevent the general provisions for a penalty above referred to from applying to any case in which no specific penalty was provided for the violation of any of the provisions of the chapter.

Section 1425 is in Article XXVI of the Chapter entitled "Health," and at the end of this chapter there is also a general provision for a penalty. In this case, as in the other case above referred to, there is no special provision for penalty at the end of the article which would cover any violation of the provisions of the article. There is a special provision at the end of the last section of the article, but that only applies to that particular section.

In addition to the general provisions at the end of the chapters above referred to there is in Chapter LI entitled "Ordinances" a general provision applying to the whole Code. In section 1696 the word "ordinance" is defined as meaning the entire Code, including each and every section thereof;

and in section 1697 a general penalty is provided for the doing of any act, or the omission to do any act contrary to the provisions of any section of "this ordinance."

In view of the provisions above referred to at, or near to, the end of the chapter entitled "Buildings" and at the end of said chapter entitled "Health," we do not think it would be necessary or proper in the cases under consideration to resort to the general provision contained in the Chapter entitled "Ordinances" above referred to. That provision only becomes effective if and where there is no other provision. In the case of section 616 of the chapter entitled "Buildings," the proper course would be to assess the fine under section 720 of that chapter, and in the case of section 1425 of the chapter entitled "Health," the proper course would be to assess the fine under section 1493 of that chapter.

Yours respectfully,

WILLIAM DILLON,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

DECEMBER 19, 1912.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

We have your letter of December 4, transmitting a copy of a Master's deed to the Chicago Tunnel Company, conveying all rights and franchises originally granted to the Illinois Telephone and Telegraph Company, its assigns and lessees.

The ordinance from the City to the Illinois Telephone and Telegraph Company (Sec. 2) provides:

"It shall be expressly the condition of this grant that if the Illinois Telephone and Telegraph Company, or any of its successors or assigns, shall either sell out to or enter into any agreement with any existing telephone company, or any of its successors or assigns, doing business in the City of Chicago, which agreement would tend to make competition inoperative, this ordinance shall become null and void, and the plant of said company, together with its conduits, wires and poles then in the

streets belonging to said company shall be forfeited to the city."

In view of the fact that the grant under consideration is to the Illinois Telephone and Telegraph Company, its assigns and lessees, we are of the opinion that the consent and approval of the Council to the conveyance, a copy of which you transmit, is not only unnecessary but would have no legal effect, provided the Chicago Tunnel Company is not a competitor of the Company whose rights are conveyed by the Master's deed.

Section 7 of this ordinance provides:

"Said Telephone Company, as compensation for the benefits conferred upon it by this ordinance, shall pay as annual compensation into the treasury of the City of Chicago, a percentage of its gross receipts from the operation of its plant, as follows: During the period of ten (10) years beginning ten (10) years after the passage of this ordinance, three (3) per cent.; during the period of the next five (5) years, five (5) per cent.; and during the remaining period of five (5) years, seven (7) per cent. No compensation is to be paid to the city for the benefits so derived during the first ten (10) years, and the above shall be the only compensation required or exacted from said company. Said compensation to be paid on the 15th day of January of each year after the same has accrued, and said company shall deliver to the Comptroller of the City of Chicago, on or before said date, a statement under oath by its president or treasurer, setting forth in detail what were the gross receipts of said company for such period and such city shall also have the right to have its duly authorized agents examine the books of said company, upon request, for the purpose of ascertaining what is justly due said city under this ordinance."

Section 9 of an ordinance passed July 15, 1903, granting certain rights to the Illinois Telephone and Telegraph Company, is as follows:

"As compensation for the privilege conferred by this ordinance for the transmission and transportation of mail, newspapers, packages and merchandise, the said company shall pay into the City Treasury annually, on the 15th day of January of each year, percentages of its gross receipts for the preceding year of the business conducted under authority of this ordinance, as follows:

For the first ten years of the grant, five per cent.; for the second ten years of the grant, eight per cent.; and for the balance of the term of the grant, twelve per cent. On all gross receipts said company derives from the rental of space in its tunnels and conduits it shall pay into the City Treasury twelve per cent. thereof annually, payments to be made on the 15th of January of each year."

The ordinance last aforesaid was amended by an ordinance passed February 1, 1909, which amendatory ordinance is in part as follows:

"The said company, its assigns and lessees, shall, beginning with the 15th day of March, 1909, and on the 15th day of each and every succeeding March thereafter during the life of this ordinance, prepare and file with the City Comptroller of the City of Chicago annual reports for the preceding year ending on the 31st day of December.

Such report shall be in writing, verified by the affidavit of the president and secretary of said company, and shall set forth in reasonable detail, according to forms prescribed by the said Comptroller, the character and amount of business done by the company for the year immediately preceding such report, and showing the amount of receipts from the expense of conducting the said business; and giving full information on all such other matters as may be from time to time specified by the City Council; and the said City Comptroller or accountants authorized by him, under the direction of the Mayor or City Council of said city, shall have the right at all reasonable times to examine all the original books, vouchers and records of the receipts and expenditures of the company, or relating to its business or affairs for the purpose of ascertaining the accuracy of the report herein required, and the rights of the city under this ordinance."

This provision is re-enacted in an amendatory ordinance of June 28, 1909.

You will note that the grantee is required to pay varying percentages of its gross receipts as years elapse, and it is required to furnish a report to the Comptroller under the oath of its President or Treasurer, setting forth in detail what the gross receipts were for the annual period preceding. The city is by these sections given the right to examine by its duly authorized agents, the books, vouchers and records of the receipts and expenditures of the company, etc., of said company,

upon request, for the purpose of ascertaining what is justly due to the city under the ordinance.

Our answer to your second interrogatory, therefore, is that the company is not required to submit all contracts that in any manner affect its revenue under this franchise, but the city, upon request, is entitled to examine the books, etc., of the company, for the purpose of getting information as to its gross revenues.

Yours respectfully,

CHAS. M. HAFT,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

DECEMBER 20, 1912.

HON. JOHN MCWEENY, General Supt. of Police.

Dear Sir:

Section 1988 of the Municipal Code provides:

“Any person or persons who shall obtain money or property from another by fraudulent devices and practices in the name of, or by means of spirit mediumship, palmistry, card reading, astrology, seership, or like crafty science, or fortune telling of any kind, shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars for each offense.”

Under this section the city has been prosecuting the class of offenders therein enumerated.

The Supreme Court in a decision upon December 17, 1912, in case of *City of Chicago v. Professor Ross*, denied the power of the City of Chicago to pass such an ordinance. It is held in this case that there is no clause in the City and Village Act which gives the city the power to pass such an ordinance.

This is final in so far as the power of the council at the present time is concerned.

Before any new ordinance can be passed it will be necessary to secure legislation giving the city the power to punish

this character of offense. Until such time no prosecution can be brought under the section of the ordinance above quoted.

Very respectfully,

GEORGE L. REKER,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

DECEMBER 20, 1912.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

You recently asked me if the city can pay the cost of maintaining the Board of Local Improvements out of special assessment funds instead of the general fund of the city.

I am of the opinion that under the provisions of section 94 of the Local Improvement Act, all expenses of maintaining the Board of Local Improvements must be paid out of the general funds. The Supreme Court had occasion to pass on this question in the cases of *Betts v. City of Naperville*, 214 Ill. 380, at p. 286, and *Gage v. Village of Wilmette*, 230 Ill. 428, at p. 434. In the latter case the court said:

"The appellants insist in the petition for rehearing, as they did in their original brief, that by the wording of the estimate the expenses of maintaining the board of local improvements can be paid out of this assessment. Under section 6 of the Local Improvement Act (Hurd's Stat. 1905, p. 405), it is plain that in cities having a population of 100,000 or more regular salaries are to be paid from the general funds of the city to the members of the local board of improvements, and that in all other cities, villages and incorporated towns this board is made up of regular employees of the city or members of the city or village councils. Clearly, they are not to be paid, as members of the local board of improvements, any additional compensation. Under section 94 of the Local Improvement Act (Hurd's Stat. 1905, p. 427), in cities, town and villages having a population of less than 100,000 it may be provided by ordinance that a certain sum, not exceeding six per cent. of the amount of the assessment, may be applied to the payment of the costs and expenses of the improvement. It would be impracticable, however, to take from the funds of a particular assessment the

money to pay, proportionately, the regular salary of any employee of the local board of improvements. The law does not fix any fees for services for the proceedings before the board in making an assessment, and if it were attempted to pay, proportionately, the salary of any city employee from any assessment, such a division would necessarily be arbitrary and would be impossible to carry out without actually charging to one assessment a portion of the costs of other local improvements. This cannot be done. (*Betts v. City of Naperville*, 214 Ill. 380.) If, however, a person who is not a regular employee of the city or village should be hired to do special work on a particular improvement, doubtless, under this law, he could be paid for his work from that assessment. For example, if a village does not have a regular engineer employed at a stated salary, such a man might be hired and paid for his special work on the improvement out of the funds raised by that assessment."

Yours very truly,

WM. H. SEXTON,
Corporation Counsel.

DECEMBER 24, 1912.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

In reply to your letter of December 18, 1912, as to whether the South Park Commissioners are entitled to free water along Western avenue from Thirty-ninth street South to Fifty-fourth street and connections with the city water mains, let me say that in the past the City of Chicago has made the connections with the city water mains according to such plats as were from time to time submitted, as is requested of the City of Chicago in this instance, and we see no objection to the water pipe extension division going ahead according to the permit, map and plat hereto attached.

However, in regard to whether the South Park Commissioners are entitled to free water in this particular instance, it is an open and debatable question. The contract ordinance which provides for the supply of free water to the South Park Commissioners read as follows:

“AN ORDINANCE

Granting free water to the South Park Commissioners.
Be it ordained by the City Council of the City of Chicago:

Section 1. That, whereas, by ordinance passed on the 18th day of May, 1896, as amended by ordinance passed on the 19th day of October, 1896, the consent of the City of Chicago was granted that the South Park Commissioners might select and take Jackson street, from the east line of the Chicago River to the east line of Michigan avenue,

And, Whereas, The taking of said part of said Jackson street by the South Park Commissioners will add a large burden of expense for maintenance to the expenses of the South Park Commissioners, and relieve the City of Chicago of a large burden of expense,

And, Whereas, The City of Chicago desires to offer a reasonable inducement to the South Park Commissioners to select and take said street as aforesaid.

Now, therefore, It is hereby understood and agreed that in case the said South Park Commissioners shall select and take that part of said Jackson street as aforesaid, in accordance with the terms of the ordinance heretofore passed by this Council, the City of Chicago will furnish to the South Park Commissioners the water needed to be used in connection with the parks and boulevards under the control of the South Park Commissioners free of expense, but subject to such reasonable regulations and rules concerning the use thereof, as may be provided from time to time by the Commissioner of Public Works of the City of Chicago.

Section 2. This ordinance shall be in force from and after its passage.”

(See Council Proceedings, 1896-1897, November 16, 1896, Page 1097. See also Page 1121 of same volume).

We are of the opinion that the aforesaid ordinance applies only to such parks and boulevards as were under the jurisdiction and control of the South Park Commissioners at the time said ordinance was passed; and that the same does not apply to, nor would it contemplate, nor is it reasonable to suppose that it contemplated all the new small parks and extensions, which have been added to the South Park Commissioners since the said ordinance was passed, for the reason that these new extensions and small parks were not in the minds of the parties to said ordinance at the time of its passage,

nor could it have reasonably been foreseen that such new parks and extensions would be added to the then South Park system. We hold that the following authority governs the case at hand.

Harz v. Peterson, 80 Ill. App. 23.

We are, therefore, of the opinion that an Order should be presented to the City Council requesting the application of free water in said locality.

Attached hereto please find return of map, plat and correspondence.

Yours respectfully,

J. J. VITERNA,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

DECEMBER 24, 1912.

HON. JOHN MCWEENY, General Superintendent of Police.

Dear Sir:

You forwarded to this department a report on the Temple Theater, located at No. 3121 Lincoln avenue, concerning a guessing contest conducted there, and asked to be advised whether such contest and the distribution of prizes was contrary to law.

The report of the officer in charge of the moving picture bureau states that the guessing contest in question is conducted by placing a number of beans in a glass jar. Patrons of the theater are permitted to guess and the one who guesses nearest the correct number of beans in the jar wins the prize. This is clearly a gambling contest. All the elements of a lottery are present. The consideration consists in the payment of the admission fee entitling the person who thus pays to a chance in the contest. The guessing is purely a matter of chance, hence there is a consideration, a prize and a chance which are the three elements that combined constitute a lottery scheme.

On being told that their plan was illegal, these parties changed same and distributed cards on the sidewalk for the guessing contest, but so manipulated the enterprise that only those who entered the theater had any chance for winning

the prize. This is practically the same as the plan originally followed and must be regarded as a gambling contest.

The question has arisen as to whether they will be permitted to distribute prizes if they enable parties who do not enter the theater an equal opportunity of winning same with those who are patrons.

This department had occasion some time ago to hold that where persons were engaged in an ordinary mercantile business they had a right to distribute cards entitling the holders to chances on a prize if such distribution was made to anyone who desired a chance, regardless of whether the party asking for such card was a patron of such establishment or not. Under the law, the city authorities have no power to stop such a chance distribution when carried on in connection with an ordinary merchandising business, but the rule is different in the case of an amusement enterprise, owing to the fact that we have an ordinance governing such distribution in a place of amusement. Section 116 of The Chicago Code of 1911 requires that all licenses for entertainments "shall contain a proviso that no gaming, raffle, lottery or chance gift, distribution of money or article of value, shall be connected therewith or allowed by the person obtaining such license, or in any wise permitted to be held out as an inducement to visitors." Such a condition may be imposed on owners of theaters under clause 41 of section 1, article V, of the Cities and Villages Act. This gives the municipality power "to license, tax, regulate, suppress and prohibit" theaters, etc., and it has been held that under such broad powers the city may impose such condition as it sees fit when it issues a license to conduct such a business.

Lauder v. People, 111 Ill. 219.

Inasmuch as the ordinance prohibits a chance distribution in connection with an entertainment of this kind, all such schemes as the one in question should be suppressed.

We return herewith files from your department relating to the above.

Yours respectfully,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

DECEMBER 26, 1912.

HON JOHN E. TRAEGER, Comptroller.

Dear Sir:

We are in receipt of your communication asking whether the Comptroller would be warranted in paying, first, the increased salary of the Chief Justice of the Municipal Court of \$10,000 per annum, and, second, the salaries of three extra associate justices at \$6,000 a year without a special appropriation in each instance.

Paragraph 8 of an Act in relation to a Municipal Court in the City of Chicago, in force July 1, 1905, as amended by act approved June 3, 1907, and adopted at the election held September 17, 1907, provides in part that—

“The salaries of the Chief Justice and associate judges shall be fixed by the city council; *Provided, however*, that the salary of the Chief Justice shall not be less than Seven Thousand Five Hundred dollars (\$7,500) per annum, and that the salary of an associate judge shall not be less than Six Thousand Dollars (\$6,000) per annum * * * and that the salary of no judge shall be increased or diminished during the term for which he shall have been elected: and *Provided, further*, that until the fixing of the salaries by the city council the salary of the Chief Justice shall be Seven Thousand Five Hundred Dollars (\$7,500) per annum and the salary of an associate judge shall be Six Thousand Dollars (\$6,000) per annum. Such salaries shall be payable out of the city treasury.”

Hurd's Rev. Stat., 1911, p. 710.

By amending section 1648 of the Chicago Code of 1911, it was provided that—

“The salary of the Chief Justice of the Municipal Court of Chicago shall be and the same is hereby fixed at the sum of Ten Thousand Dollars (\$10,000) per annum.”

Under the appropriation bill for 1912 the Chief Justice was appropriated for under account known as “31 A” at \$7,500, and each of the associate judges at \$6,000. On the first Monday in December of this year the Chief Justice and the three extra justices having been previously elected, took their seats upon the bench and were inducted into office. No appropriation was made for the three extra judges in the appropriation bill of 1912 nor was any appropriation made in that bill for the additional salary of the Chief Justice.

Section 2 of article VII. of Chapter 24, Hurd's Revised Statutes, 1911, p. 272, provides in part—

“The city council of cities * * * shall within the first quarter of each fiscal year, pass an ordinance, to be termed the annual appropriation bill, in which such corporate authorities may appropriate such sum or sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such corporation; such ordinance shall specify the objects and purposes for which such appropriations are made, and the amount appropriated for each object or purpose. *No further appropriation shall be made at any time within such fiscal year*, unless the proposition to make each appropriation shall have been first sanctioned by a majority of the legal voters of such city * * *

It is desirable, if it can be done, and at the same time in consonance with the principles of statutory construction, that the section of the cities and villages act just quoted and section 8 of the Municipal Court Act should be given a harmonious construction so that the provisions of both may stand, and carrying out this idea, it is my opinion that the council, in passing the amendatory ordinance increasing the salary of the Chief Justice merely fixed the rate at which he should be paid, and that such additional rate will not be payable until the council appropriates for the additional pay in the annual appropriation budget. The council have gone upon record in setting the pay of the Chief Justice at \$10,000 per annum and after the first of January it is to be presumed that the same council will make suitable appropriation to carry out the provisions of the amendatory ordinance. Until such appropriation is made, however, I am of the opinion that the excess over the statutory minimum of \$7,500 per annum should not be paid.

In regard to the three associate judges no appropriation whatever has as yet been made for them nor have their salaries been fixed by the city council. The statute, however, provides for a minimum of \$6,000 for all associate judges until fixed by the council. The Municipal Court statute expressly provides, not only that until the fixing of the salaries by the council the salary of an associate judge shall be \$6,000 per annum, but also that such salary shall be payable in monthly

installments out of the city treasury. The legislature will be presumed to know that appropriation bills cannot be passed except in the first three months of each fiscal year, and it is a matter of common knowledge which they may be supposed to have cognizance of that the matter of preparation of an appropriation bill, particularly in cities like Chicago, is a matter of great labor and considerable delay, the bill frequently not being passed until well along in February. Knowing these facts, it is not likely that the legislature intended that any extra municipal judges taking office the first of December should be compelled to wait for their salary until nearly the first of March, and in view of these facts, I construe the language "that until the fixing of the salaries by the city council the salary of an associate judge shall be \$6,000 a year," taking in conjunction with the words which follow it, to be a mandate upon the disbursing officers of the city to pay these associate judges their salaries even without a special appropriation.

To conclude, therefore, I would advise that you are without power to pay the amount of extra salary of the Chief Justice until a suitable appropriation has been made in the appropriation bill therefor and such appropriation bill has been passed by the council, but that in the case of the associate justices, they are entitled to be paid \$6,000 per annum each from the date of their assuming office.

Yours respectfully,

JOHN W. BECKWITH,

First Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

DECEMBER 30, 1912.

MR. JOSEPH O. KOSTNER, Deputy Commissioner of Public Works.

Dear Sir:

You have requested an opinion as to what is the legal manner of appointment of bridge tenders, and have stated in

your letter that sections 1098 and 1099 of the Chicago Code of 1911 provide for the manner of appointment and approval of bonds of bridge tenders.

You further state that since 1907 bridge tenders have been certified to the Commissioner of Public Works by the Civil Service Commission and the bonds have not been furnished in conformity with the sections of the code above mentioned.

Section 1098, above referred to, originally provided, in regard to bridge tenders, as follows:

“There shall also be appointed by the Mayor, by and with the advice and consent of the City Council, such number of bridge tenders as the City Council shall be ordinance provide.”

This section was amended by ordinance passed July 22, 1912 (Council Proceedings, page 1621); so that that part of it dealing with bridge tenders now reads as follows:

“There shall also be appointed according to law such number of bridge tenders and such number of harbor police as assistants to the harbor master, and such number of bridge telephone operators as assistants to the vessel dispatchers as may be provided for by the City Council.”

There can now therefore be no doubt that the certification of bridge tenders by the Civil Service Commission is now legal under the above ordinance as amended.

By the same ordinance on July 22, 1912 (Council Proceedings, page 1621), section 1099 was amended to read as follows:

“BONDS). Each of the officers or employes provided for herein to be appointed by the Mayor by and with the advice and consent of the City Council, *and each of the bridge tenders appointed hereunder*, shall execute a bond to the City in the sum of five thousand dollars (\$5,000.00) with sureties to be approved by the City Council, conditioned for the faithful performance of the duties of his office.”

You are therefore advised that bridge tenders should be certified by the Civil Service Commission and should give

bonds in the sum of \$5,000.00, with sureties to be approved by the City Council.

Yours very truly,

CRAWFORD ROSS,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

DECEMBER 31, 1912.

HON. EDWARD COHEN, City Collector.

Dear Sir:

Your communication of the 26th inst. *in re* bond required of oil peddlers, has been referred to me for reply. Section 1771 of The Chicago Code of 1911 provides that:

“any person desiring to obtain a license to engage in, conduct or carry on the business of peddling oil, solely, shall so state in his application and shall specify the number of wagons or other similar vehicles he desires or intends to employ in and about such business.”

* * * *

Section 1771 also provides:

“Such application shall also be accompanied by a bond, executed to the City in the sum of five hundred dollars, etc.”

I am of the opinion that this section requires a bond in the sum of five hundred dollars to be executed to the City for carrying on the business of peddling oil and that such bond is sufficient regardless of the number of wagons used and licensed by one applicant.

Yours very truly,

LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

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